SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

No. 75-588

STATE OF WASHINGTON, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, CARL CROUSE, Director, Department of Game, and WASHINGTON STATE GAME COMMISSION,

Petitioners,

v.

UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE PRINTING PLANT — OLYMPIA, WASHINGTON

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The petitioners State of Washington, Thor C. Tollefson, Director, Washington State Department

of Fisheries, Carl Crouse, Director, Department of Game, and Washington State Game Commission respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1975 (Petition for rehearing denied July 23, 1975). The opinion, which is included in the Appendix, pp. 35-56, has not yet been published in the Federal Reporter.

OPINIONS BELOW

This proceeding was commenced as a declaratory judgment action in the United States District Court for Western Washington in September, 1970, by the United States on behalf of seven Indian tribes. Seven additional tribes were permitted intervention prior to trial, and twelve additional tribes joined in post-trial proceedings. Defendants were the State of Washington and its Departments of Game and Fisheries. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3)(4), 1345 and 1362. The action sought a declaration of the tribes' off-reservation treaty fishing rights in an area encompassing Puget Sound and the Olympic Peninsula of Western Washington.

Following trial, the District Court entered a memorandum decision on February 12, 1974. 384 F. Supp. 312 (W.D. Wash. 1974). *See*, Appendix, pp. 59-92. The court held that members of the plaintiff tribes have treaty rights which the court interpreted to require: (1) That certain tribes, meeting condi-

tions and qualifications created by the court, could preempt state regulation and exclusively regulate their own members' off-reservation fishing; (2) that state regulation of the remaining tribes was conditioned on tribal consent or prior court approval; (3) that state fish and game laws could not constitutionally be applied to treaty Indians fishing off reservation;* (4) that a 1937 Convention between the United States and Canada together with implementing legislation, providing for international regulation of the major salmon harvest within the case area, did not modify prior Indian fishing rights; and (5) that the opportunity to harvest fish was to be apportioned on a percentage share basis as follows: Indians have the opportunity to catch for *commercial purposes* 50% of all the harvestable fish which would return to their usual and accustomed fishing areas if there were no other fisheries *PLUS* (a) commercial harvests on reservation; (b) harvests for personal consumption; and (c) harvests for ceremonial purposes. The court further held that Indian harvests outside their usual and accustomed grounds are considered as part of the *non-Indian* rather than the Indian harvest in determining the 50% share. Additionally, the court decreed that Indians are entitled to an extra share, denominated an "equitable adjustment," of fish over and above their 50% entitlement to compensate them for fish taken in areas outside the jurisdiction of the State of Washington but contiguous thereto.

*These statutes are set forth in the Appendix pp. 101-105.

A panel of the United States Court of Appeals for the Ninth Circuit on June 4, 1975, entered an opinion substantially affirming the District Court and on July 23, 1975, denied a petition for rehearing.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties contain a provision of which the following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided however, that they shall not take shellfish from any beds staked or cultivated by citizens.

The six treaties are: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty with the Makah (Treaty of Neah Bay) January 31, 1855, 12 Stat. 939; Treaty with the Quinaielt (Treaty of Olympia) July 1, 1855, 12 Stat. 971; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951.

This litigation also involves a 1937 Convention with Canada (50 Stat. 1355), a 1957 Protocol amending the same (T.I.A.S. 3867, 8 U.S.T. 1057), federal statutes implementing it (16 U.S.C. §§ 776-776f), and a Washington implementing statute (RCW 75.40.060). Pertinent provisions of the foregoing are set forth in the Appendix.

ISSUES PRESENTED

1. Must the state in exercising its jurisdiction over off-reservation Indian fishing, before restricting that fishery, prohibit all non-Indian fishing and obtain the approval of the court or the Indian tribe affected by the regulation?

2. Do Indian tribes have extraterritorial jurisdiction to prescribe and enforce off-reservation fishing regulations and, if such jurisdiction exists, can its exercise restrict the power of the state to regulate?

3. Can a federal District Court, without the benefit of express legislation, grant exclusive off-reservation jurisdiction to Indian tribes selected by it and thereby preempt the exercise of state jurisdiction?

4. Do the treaties entitle Indians to 50% of all the harvestable fish in Western Washington and an additional adjustment for fish caught in adjacent waters outside the state's jurisdiction?

   a. Do the Stevens' treaties mandate a 50% share for Indian fishermen?

   b. Did the Court of Appeals err in deferring

to the discretion of the District Court when no discretion was exercised by it in establishing the 50% share?

c. Should the total net harvest of Indian fishermen, whether on the reservation, in usual and accustomed grounds off-reservation or in the general all-citizen fishery be included in determining the Indians' share of the harvest?

d. Is there any basis in law for the court to require an additional adjustment for Indians in excess of its decreed 50% share to reflect fish caught in International Pacific Salmon Fisheries Commission waters and waters outside the State of Washington?

5. Does the 1937 Convention between the United States and Canada (50 Stat. 1355) and implementing federal legislation take precedence over the treaties executed in 1854 and 1855 with Washington Indians?

STATEMENT OF FACTS

The treaties executed in 1854 and 1855 were in anticipation of an influx of settlers into Western Washington. The Indian settlements were widely dispersed and fish was a major food source with the Indian fishery being primarily for subsistence. The treaties contemplated the creation of reservations and reserved to the Indians the opportunity to con-

tinue to gather fish at their usual and accustomed places.

Until the invention and perfection of the canning process late in the 19th Century, commercial fishing enterprises were rudimentary and largely unsuccessful. The advent of the canning process gave rise to large scale commercial fisheries which have been and now are open to all citizens, both Indian and non-Indian. Today the Indian fishery is primarily commercial. In addition to river net fisheries, significant numbers of Indian commercial fishermen fish in regular commercial fishing seasons outside their usual and accustomed areas, as well as special Indian seasons within their treaty areas. They use the same gear and have the same economic incentive as non-Indian fishermen. They are not charged license fees and do not pay landing taxes[1]. The fishery resource is fragile. The boom in commercial fishing at the turn of the century brought the concomitant need for state regulation to conserve the species and provide for an orderly fishery.

This proceeding is concerned with the fishery for anadromous fish which are spawned in fresh water, migrate to the ocean, and return to their river of origin to reproduce the next generation[2]. These anadromous fish consist of steelhead and five species of salmon: chinook, coho, chum, pink and sockeye. These fish are produced naturally in 15 major river

[1]*See, Tulee v. Washington*, 315 U.S. 681 (1942).

[2]The District Court now has expanded the scope of this litigation to include nonanadromous fish; i.e., herring.

systems and their tributaries in the case area and 239 small, independent streams. In addition, the state augments natural runs with hatchery produced fish, and in some rivers and streams the state has created entirely artificial runs of fish.

The runs of each species of salmon to the different rivers and streams are mixed in marine areas. This mixing of runs; e.g., Green River Chinook with White River Chinook, is complicated by the mixing of runs of different species; e.g., Green River Chinook and Coho and White River Chinook and Coho. As the mixed runs proceed along the Pacific Coast or through the Straits of Juan de Fuca and into Puget Sound, each run breaks off and enters its natal stream. Different rivers and streams have differing capacities to support natural and artificial stocks of fish, thereby complicating the intricacies of mixed stocks with the factor of different run sizes for different natal areas, which in turn is complicated by the fact that run sizes for individual streams fluctuate from year to year. The species, the run size, the yearly run size fluctuation all must be reflected in harvest regulations in order that adequate spawning escapement for each run can be achieved.

In order to have a rational harvest of such a complex fishery, the State of Washington and the International Pacific Salmon Fisheries Commission (hereinafter referred to as the Commission) have developed sophisticated management systems of analysis, prediction, daily monitoring, artificial supple-

mentation, and regulation to insure protection of the resource and a maximum sustained yield.

State regulation is shared between the Department of Game, which regulates steelhead[3], and the Department of Fisheries, which regulates salmon. The Commission acts pursuant to a Convention between the United States and Canada, executed in 1937, to regulate harvests of Fraser River salmon in waters of the State of Washington and the Province of British Columbia. Pursuant to authorization from Congress, the state enforces the Commission's regulations. *See generally*, 16 U.S.C. §§ 776-776f. The harvest of Fraser River fish accounts for more than 50% of all fish harvested in the case area.

Fishing is a major commercial enterprise and recreational activity in the State of Washington. In the case area alone there are 283,650 salmon sport fishermen, 145,000 licensed steelhead sport fishermen, 6,600 licensed non-Indian commercial fishermen and 794 Indian commercial fishermen.

REASONS IN SUPPORT

Summary of Argument

The Circuit Court has sanctioned the judicial creation of a jurisdictional entity denominated a "self-regulating tribe" which can without benefit of

[3]Steelhead is a game fish in the State of Washington and is subject only to a hook and line fishery in fresh water except for a commercial fishery by Indians (*Puyallup II*, 414 U.S. 44 (1973)). With only a hook and line fishery, there has not been the need for the type of sophisticated management systems required for salmon, but rather the efforts have been devoted to the augmentation and general management of the steelhead runs. Furthermore, the steelhead population is substantially smaller than that of salmon, the respective harvests in 1971 being 264,599 to 7,777,093.

express federal legislation preempt a state from exercising jurisdiction over its tribal members' activities off reservation. The impact of this jurisdictional mutation is national and has a direct bearing upon all of the Western states encompassed by the Ninth Circuit, wherein a substantial number of treaty Indians reside. The Circuit Court's conditioning the exercise of state police power on tribal action and its redefinition of "conservation" in a manner inconsistent with prior decisions of this Court has crippled the states' ability to fulfill their long-established responsibilities for conservation of natural resources. The Circuit Court has decreed an allocation of the resource not in terms of a limited geographical location such as contemplated by this court in *Dept. of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II), but rather in terms of the entire migratory pattern of the resource. The Circuit Court has impaired the operations of the International Pacific Salmon Fisheries Commission, and refused to grant effective relief when the District Court has ordered the State of Washington to perform certain acts in violation of the Convention with Canada.

Petitioner submits that the importance of these issues, the Circuit Court's complete disregard of applicable decisions of this Court, the lack of precedent for many of the Circuit Court's holdings, and the impact both regionally and nationally require a resolution of these issues by this Court.

I.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Expansion of Tribal Jurisdiction By the Courts Below Exceeds the Jurisdiction Rules Uniformly Applied By This Court.

The Court of Appeals affirmed the District Court's grant of extraterritorial jurisdiction to Indian tribes to prescribe and enforce (arrest by tribal officers off reservation) fishing regulations off reservation. This holding is in direct conflict with the holding in *Kennedy v. Becker*, 241 U.S. 556 (1916), recent pronouncements by this Court on the nature of tribal self government and general jurisdictional principles.

In *Kennedy* the Seneca Indians claimed that the tribe had the authority to regulate tribal members at off-reservation usual and accustomed fishing grounds. This court responded at pp. 562-563:

> The *contention of the plaintiffs* in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the *dual sovereignty* of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." *We are unable to take this view.* It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise au-

> thority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. *Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.* [Emphasis supplied.]

This Court held the treaty did not reserve any tribal sovereignty in off-reservation areas. This holding was reaffirmed in *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 399-400 (1968). Cf., *De Coteau v. District County Court for the Tenth Judicial District*, 95 S. Ct. 1082, 1084 (1975).

The Court of Appeals attempted to distinguish *Kennedy* by holding that there is no "dual sovereignty" but merely "concurrent jurisdiction." This is a distinction without a difference. Concurrent jurisdiction requires that both jurisdictional entities have sovereignty over the locus in quo; i.e., there is *a priori* dual sovereignty. The only authority relied on by the Court of Appeals was their prior panel decision in *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). *Settler* held that an Indian tribe could prescribe and enforce (arrest occurred on reservation) off-reservation fishing regulations. The opinion was rendered without any anaylsis of jurisdiction rules and without citation of authority, the court simply opining that it must have been the Indians' understanding at treaty time that they would continue to exercise conrol over off-reservation fishing. *Id.* at 236-237. No reference was made to the record to support this subjective hypothesis, and the record in the instant

case clearly establishes that none of the parties to the treaties contemplated the future need for regulation of fishing which did not occur until development of commercial fishing in the late nineteenth century.

The concept of extraterritorial jurisdiction is totally foreign to the recent decisions of this court. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) the court rejected arguments of inherent tribal sovereignty and said that limitations of state power result instead from federal pre-emption. This Court barred a state tax for *on*-reservation activity and expressly emphasized that it was not a case where the state sought to reach activity undertaken by reservation Indians on non-reservation lands. 411 U.S. at 168. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) this Court upheld a state tax on *off*-reservation activity. The court stated: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws otherwise applicable to all citizens of the state." *Id.* at 148-149. This Court expressly relied on *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I) to support that proposition. *Puyallup I* had relied on *Kennedy* for the proposition that Indian tribes had not reserved off-reservation jurisdiction.

The federal policy not to preempt state regulation in favor of tribal regulation or to grant tribes concurrent jurisdiction to prescribe or enforce tribal fishing regulations off-reservation is reflected in the

regulations establishing the Court of Indian Offenses which limit the jurisdiction of the Indian courts to enumerated offenses, including game violations (25 C.F.R. § 11.57 (1973)), "committed by an Indian, *within* the reservation or reservations for which the court is established." 25 C.F.R. § 11.2 (1973). [Emphasis supplied.] Similarly the constitutions of the plaintiff tribes limit their jurisdiction to their reservations.

The rule that jurisdiction of an Indian tribe ceases at the border of its reservation is supported in the opinions of the United States Attorney General, the Interior Department Solicitor and in the literature. Department of Interior, Federal Indian Law 450 (1958); 18 Op. Atty. Gen. 440 (1886); Sol. Op. M 36316; Kane, Jurisdiction Over Indians and Indian Reservations, 6 Ariz. L. Rev. 237, 248 (1965); Parker, State and Tribal Courts in Montana: The Jurisdictional Relationship, 33 Mont. L. Rev. 277, 279 (1972).

The general jurisdictional rule is that the authority of any nation or sovereignty is confined within the bounds of its own territory with certain exceptions based on protection of internal interests or nationality. *See Skiriotes v. Florida*, 313 U.S. 69 (1941); *Ford v. United States*, 273 U.S. 593 (1926); *United States v. Bowman*, 260 U.S. 94 (1922); *Strassheim v. Daily*, 221 U.S. 280 (1910); *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909; *The Appollon*, 22 U.S. (9 Wheat) 362 (1824).

See also, Restatement (2d) of the Foreign Relations Law of the United States, § 18 (1965). But even in those instances where a state exercises jurisdiction in a foreign state under either the protective or nationality principle, it does not have the jurisdiction to arrest the offender in the foreign state but must wait until he is found or brought (via extradition)[4] within its own territorial limits. The power to arrest is confined to the territory of the authority making the arrest except in cases of hot pursuit. *Ward v. Texas*, 316 U.S. 547, 86 L. Ed. 1663, 62 S. Ct. 1139 (1942); *The Appollon, supra*; *Davis v. United States*, 409 F.2d 1095 (5th Cir. 1969); *McLean v. Mississippi ex rel. Roy*, 96 F.2d 741 (5th Cir. 1938); *Kirkes v. Ashew*, 32 F. Supp. 802 (E.D. Okla. 1940); *Ex parte Crawford*, 148 Wash. 265, 268 Pac. 871 (1928) aff'd on rehearing 140 Wash. 698 (1929); Annotation, 161 A.L.R. 377 (1929), and cases cited in the A.L.R. Blue Books of Supplemental Decisions.

The holding of the Court of Appeals that Indian tribes have extraterritorial jurisdiction to prescribe laws and make arrests outside their reservations is without precedent and in direct conflict with the applicable decisions of this court. The jurisdictional implications of such a decision range far beyond the fishing rights controversy. For example, the Treaty with the Yakimas, 12 Stat. 951, 953, contains a provision guaranteeing the Indians "* * * the

[4]An Indian tribe cannot have its members extradited from another jurisdiction, e.g., a state. *Ex parte Morgan*, 20 Fed. 298 (W.D. Ark. 1883).

right, in common with citizens of the United States, to travel upon all public highways." Under analogous jurisdictional principles the Yakima Tribe, which the District Court determined to be "self-regulating," could license its members and their motor vehicles and thereby preclude the state from licensing or regulating Yakima Indians driving on highways in the state, even outside the Yakima Reservation. The potentially broad scope of this issue together with the Circuit Court's disregard of binding precedent and traditional jurisdictional concepts calls for review by this Court.

B. The Circuit Court's Limitation on State Police Power is Inconsistent with Prior Decisions of this Court.

The Court of Appeals affirmed the District Court holding that state jurisdiction in off-reservation areas can be restricted by the exercise of tribal regulation or in the case of "self-regulating tribes" completely preempted. This holding flies in the face of consistent holdings by this Court that the state has the "overriding police power" to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and nondiscriminatory. *Department of Game v. Puyallup Tribe*,[5] 414 U.S. 44 (1973) (Puyallup II); *Puyallup Tribe v. Department of Game*,[6] 391 U.S. 392 (1968)

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[5] " * * * 'the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided regulation * * * does not discriminate against the Indians' " quoting *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398; 414 U.S. at 48.

[6] " * * * Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens

(Puyallup I); *Tulee v. Washington*,[7] 315 U.S. 681 (1942); *Kennedy v. Becker*,[8] 241 U.S. 556 (1916); *United States v. Winans*,[9] 198 U.S. 371 (1905).

In *Puyallup I* this Court expressly rejected the Ninth Circuit's shackling of state regulation of off-reservation fishing by permitting it only when "indispensable" for conservation. This Court held that the test was whether regulations were reasonable and necessary for conservation. 391 U.S. at 401, n 14. In *Puyallup II* this Court stated that the object was "to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. at 49.

Despite such pronouncements by this Court, the Circuit Court incongruously held at pp. 43, 44 in the Appendix:

> Direct regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a

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of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. * * *" 391 U.S. at 393.

[7] "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." 315 U.S. at 682.

[8] "* * * Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." 241 U.S. at 564.

[9] "* * * Nor does it [the Indian treaty provision permitting the taking of fish at usual and accustomed places] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 198 U.S. at 384.

> run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington*, 95 S. Ct. 944, 952 (1975) [Footnote omitted.]

The Circuit Court's reliance on *Antoine* was wholly inappropriate. In *Antoine*, this Court expressly reaffirmed the "necessary for conservation standard" of *Puyallup I*, rejected a narrower definition urged by the United States i.e., a "compelling need" test, and stated that the question of the regulation's necessity for conservation was not an issue in the case. Id. at 952.

The Circuit Court has reimposed its "indispensable" test in different language, making it impossible for the state to follow the direction of this Court to accommodate the rights of Indian people with the rights of other citizens. The Circuit Court "test" has rendered meaningless this Court's consistent holdings that the state has the "overriding police power" to regulate in nondiscriminatory ways the time and manner of Indian off-reservation fishing.

The requirement that state regulation is subject to consent of the tribes, or alternatively the court, before it is enforceable is completely inconsistent to this Court's statement in *Puyallup I* that state police power to regulate fishing was overriding and the holding of the District Court in Oregon that tribal consent was not required for the state to enforce restrictions on the exercise of treaty rights. *SoHappy v. Smith*, 302 F. Supp. 899, 912 (1969). The holding

below completely circumvents the state's Administrative Procedures Act, and creates a presumption of invalidity contrary to the well-established presumption that administrative regulations, enacted pursuant to properly delegated authority, are valid. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 185-186 (1935); *United States v. Boyd*, 491 F. 2d 1163, 1167 (9th Cir. 1973).

This departure of the court below from the well-established guidelines of this Court necessitates review of its decision.

II.

THIS PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Quantification of the Treaty Rights in Terms of a Percentage of the Harvest of a Natural Resource Presents An Unprecedented Question of Broad Application.

This Court has previously considered Indian fishing treaties but has never quantified Indian fishing rights in terms of a percentage of the harvest, as have the District and Circuit Courts in this case. This quantification has had a far greater impact on Indian and non-Indian fishing and on the state management of the fishery resource than any other event in the evolution of the law of Indian fishing rights.

The District Court, with complete disregard for the guidelines suggested by this Court in *Puyallup*

II,[10] ruled as a *matter of law* that the treaty language "in common with" required that Indians have an opportunity to catch for commercial purposes 50% of the harvestable fish, *PLUS* (1) commercial harvests on reservation; (2) harvests for personal consumption; and (3) harvests for ceremonial purposes. The court further held that Indian harvests outside their usual and accustomed grounds are considered as part of the *non-Indian* harvest rather than the Indian share. In addition the court decreed that Indians are entitled to an additional share, denominated as an "equitable adjustment," of fish over and above their 50% entitlement to compensate them for fish taken in areas outside the jurisdiction of the State of Washington. Although the District Court relied exclusively on a dictionary definition[11] and ruled as a *matter of law*, the Court of Appeals affirmed on the basis that the District Court had not abused its *discretion* in decreeing a 50% share. The Circuit Court did modify the "equitable adjustment" so that it would not include harvests by foreign nationals in ocean waters outside state jurisdiction.

The Indian share, which is substantially more than 50%, is grossly disproportional to the relative

[10]In *Puyallup II* at pp. 48-49, this Court stated:

What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

[11]See District Court opinion, p. 84 of the Appendix.

numbers of Indian and non-Indian fishermen, the make-up of the stocks of fish and the purposes for which the treaty fishing clause was negotiated. In the case area there are 283,650 salmon sport fishermen, 145,000 licensed steelhead sport fishermen, 6,600 non-Indian commercial fishermen, and 794 Indian commercial fishermen. The Indian population accounts for only 0.28% of the people living there, most of whom have been completely acculturated. Only 0.07% of the population are Indians living on reservations. Artificial stocks of fish propagated, in the case of salmon with general state revenues and in the case of steelhead with license fee revenues from sport fishermen, contribute signficantly to the harvest of Indians and non-Indians but neither the District Court nor the Court of Appeals considered this as a factor in making an apportionment.[12] The decision below guaranteed Indians an opportunity to harvest *commercially* more than 50% of the total fish harvest for all purposes, but at the time of the treaties commercial fisheries were rudimentary, unsuccessful operations. The treaty records indicate the concern of the Indians was for subsistence fisheries.

To achieve this 50% apportionment the court has ordered drastic reductions in commercial and sport fishing by non-Indians. Some commercial fish-

[12]The District Court withheld ruling on the natural-artificial stock distinction, but in practice under its exercise of continuing jurisdiction has included in its sharing formula both natural and artificial fish. *See* concurring opinion of Justice White joined in by Chief Justice Burger and Justice Steward in *Puyallup II*, 414 U.S. 44, 49 (1973).

ermen have been financially destroyed and the non-Indian fishing industry as a whole seriously depressed by the court's decision. The recreational fishery has been curtailed. Public reaction has been vocal and bitter. Lawsuits have been brought against the state in state court and injunctions granted enjoining state fisheries' officials from implementing reductions ordered by the federal court in non-Indian fishing seasons.[13] More than 450 damage claims have been filed by non-Indian commercial fishermen against the state alleging more than seven million dollars in damage resulting from state enforcement of the federal decree. The decision is also having a substantial impact in the state of Oregon and on Washington fisheries on the Columbia River because Judge Boldt's 50% formula was adopted in *SoHappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969) amended in an unpublished opinion dated May 10, 1974, presently on appeal to the Ninth Circuit Court of Appeals. The fishing industry, which includes commercial fishermen, sports fishermen, suppliers and tourist related interests in Washington and Oregon has been drastically affected and the court decision is having such a broad impact socially, politically and economically that it requires resolution by the highest court of the land.

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[13]*Washington State Commercial Passenger Fishing Assoc. v. Tollefson* and *Washington Kelpers Assoc. v. Tollefson*, Washington Supreme Court, consolidated under Docket No. 43642.

B. **Determination of the 1937 Convention's Effect on Prior Treaties With Indians Presents An Important Federal Question With International Consequences.**

In 1937 the United States and Canada entered into a Convention establishing the International Pacific Salmon Fisheries Commission and conferring on the Commission regulatory authority over the harvest of the Fraser River salmon runs both within American and Canadian waters. 50 Stat. 1355 as supplemented by T.I.A.S. 3867, 8 U.S.T. 1058. It is petitioners' contention that the Convention and implementing federal legislation[14] have modified the Indian treaties so that the state may enforce Commission regulations notwithstanding the fishing clause in the treaties with the Indians.

The Fraser River salmon run over which the Commission has jurisdiction returns from the Pacific Ocean via waterways which form the boundary between Washington and the Canadian province of British Columbia. This fish run represents a total harvest of approximately 7,000,000 fish and accounts for more than 50% of the commercial salmon harvest in the case area. The Commission waters are open equally to fishing by Indians and non-Indians.[15]

The Commission has no arrest or enforcement jurisdiction, which is the responsibility of the respective nations. The federal enforcement agency, de-

[14]The Sockeye and Pink Salmon Fishing Act of 1947 codified in 16 U.S.C. §§ 776-776f.

[15]Indians fishing at usual and accustomed grounds are not required to obtain a state license or pay the landing fees. *Tulee v. Washington*, 315 U.S. 681 (1942).

signated pursuant to statute (16 U.S.C. § 776d(a)), is the National Marine Fishery Service of the Department of Commerce. 12 C.F.R. 6345. The Congressional enactment empowers the federal enforcement agency to authorize officers of the State of Washington to enforce provisions of the Convention, the act and regulations of the Commission. 16 U.S.C. § 776d(b). The legislature of the State of Washington has specifically authorized the director of Fisheries to adopt and enforce provisions of the Convention and the regulations of the Commission. RCW 75.40.060. The enforcement of the Commission regulations in American waters is performed by the Washington State Department of Fisheries.

Although the Court of Appeals was requested to do so, it did not directly rule on the question of the effect of the Convention and implementing legislation on the prior treaties with the Indians. The Court concluded that although the Convention waters subject to regulation by the International Commission are beyond the jurisdiction of the State of Washington, nevertheless Indians are entitled to additional adjustments in their share of the harvest within the state's jurisdiction to reflect harvests in Convention waters.

The state's contention is that acting pursuant to 16 U.S.C. § 776d, it can enforce Commission regulations without the necessity of showing that such regulations are necessary for conservation and to the extent that the Indians' harvest is restricted through

compliance with the Commission regulations, the state has no obligation to compensate Indians by allowing them a greater harvest in areas under exclusive state jurisdiction.

The basis of the state's position is that Congress has the plenary authority to amend or abrogate Indian treaty rights by subsequent legislation. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903). *Cf. Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). While this court will not imply abrogation of such treaty rights by subsequent legislation that can be fairly construed to allow their continued exercise,[16] such exercise must conform to the requirements of the subsequent legislation. *Cf. Missouri v. Holland*, 252 U.S. 416 (1920). The Sockeye and Pink Salmon Fishing Act of 1947, as amended, however, makes it unlawful for "*any person* to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission." 16 U.S.C. § 776a(a) (Emphasis supplied) The Convention, Article IX, expressly requires that Commission regulations be enforced against "[e]very national or inhabitant, vessel or boat * * * that engages in fishing * * *" The Act and Convention make no exception for treaty Indian fishing and, unlike the *Menominee* case, there

[16] *Menominee Tribe v. United States, supra*; *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934).

is no other legislation that can be read *in pari materia* with the Act from which an exception from the Commission's regulations for Indian treaty fishing can be construed.

Since Congress has directed that Commission regulations be binding, without exception, on any person fishing in United States waters and state promulgation and enforcement of Commission regulations is in accordance with the Convention, such state regulations may be enforced against Indians without the requirement that they be necessary for conservation or providing compensating harvests in areas of exclusive state jurisdiction. To the extent that this state enforcement conflicts with rights guaranteed under the Stevens' Treaties, the Sockeye and Pink Salmon Fishing Act of 1947 takes precedence over the treaties.

The Circuit Court's opinion glosses over this issue, simply acknowledging that "Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations," (Appendix at p. 50) and then decreeing the state must permit Indians additional catches in areas under state jurisdiction to compensate them for compliance with Commission regulations.

As previously indicated, the harvest in Commission waters consists of more than 50% of the total commercial harvest in the case area. Adjustments of any magnitude as condoned by the Court of Appeals can result in precluding a non-Indian fishery in

other parts of the case area. Thus, in applying the Circuit Court's holding, the District Court has entered a series of orders compelling the Washington Director of Fisheries to act contrary to the regulations adopted by the Commission:

(1) Enjoining the director from allowing any non-Indian fishing in the Convention waters until the director allowed a special Indian fishery in those waters even though such a special fishery was not permitted by regulations of the Commission. (The Court granted a series of stays of its own order.)

(2) The Court ordered the director of Fisheries to establish by regulation two special fisheries for treaty Indians in Convention waters, which exceeded permissible fishing activities by Commission regulations.

(3) The Court ordered the director to allow Indians to fish with any type of gear whenever the Commission regulations permitted fishing by limited types of gear.

As a result of these orders, a suit was filed in state court against the director of the Department of Fisheries where it was ruled that the director lacked authority under state law[17] to adopt a regulation not in accord with the Commission's regulations. The suit[18] is presently on appeal in the state

[17]The Washington Legislature has authorized the state Department of Fisheries to adopt and enforce Commission regulations. RCW 75.40.060. *See* Appendix at p. 101. The state court held that the Department cannot adopt regulations different from those of the Commission.

[18]*Puget Sound Purse Seine Vessel Owners v. Moos*, Washington Supreme Court, Docket No. 43938.

Supreme Court. The director responded by suspending all of the state regulations affecting salmon commission waters and left the jurisdiction in the area to the federal authorities.

(4) The federal Court responded by ordering the director of Fisheries to repromulgate the regulations.

With this irreconcilable conflict between the rulings of the state court and the federal District Court, interim relief was sought from the state Supreme Court and the Ninth Circuit Court of Appeals and denied by both.

This conflict between the separate judicial systems can only be resolved by this court. It has been brought on by the refusal of the Circuit Court in its opinion below to have directly confronted the issue of the Convention's effect upon the prior treaties with the Indians. This issue needs resolution by this Court not only because the Circuit Court erred on an important federal question which has not been resolved by this Court, but also because of the impossible position in which the State of Washington and the International Pacific Salmon Fisheries Commission have been placed by the District Court's interpretation of the Circuit Court opinion.

CONCLUSION

The District Court has created, and a panel of the Circuit Court affirmed, a complex matrix of unprecedented legal relationships pertaining to treaty

Indian fishing rights based on the simple treaty clause that:

> the right of taking fish, at usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory * * *

The jurisdictional and allocation concepts embodied in this decision create a precedent which severely limits the ability of states to manage and conserve fish and wildlife resources when there are treaty tribes in their area. The allocation of over 50% of the harvestable resource to an Indian commercial fishery is not warranted by the treaties and is grossly out of proportion to any reasonable attempt to accommodate the rights of all citizens when one considers there are 283,650 salmon sports fishermen, 145,000 licensed steelhead sports fishermen, and 6,600 licensed non-Indian commercial fishermen, compared to only 794 Indian commercial fishermen.

The District Court was extremely critical of the consistent line of decisions of this Court which have upheld the state's authority to regulate off-reservation Indian fishing. (Appendix, pp. 71-77) That court paid only lip service to the concept of being bound by those decisions and in a fact emasculated those decisions by denying totally the state's ability to regulate when tribes meet criteria established neither by treaty nor statute but simply by the court. Furthermore, those tribes which do not fully meet the court's criteria are permitted, by unilateral

action, to curtail the state's ability to manage the resource. This totally unprecedented expansion of Indian jurisdiction is not based upon treaty or statutory authority and is beyond the exercise of any discretion which the Circuit Court deferred.

Only this Court can rectify the manifest errors created by the judicial decrees of the lower courts. We respectfully submit that in light of the issues presented, the rulings which are contrary to decisions of this Court, the substantial impact upon recreational and commercial fisheries in Washington and Oregon, the unprecedented concepts which substantially restrict the ability of all states having Indian populations to effectively manage and conserve wildlife resources, and the impact upon the International Convention with Canada, this proceeding stands with those cases in which the writ of certiorari should be granted.

While previously construing one of these treaties (Treaty of Medicine Creek, 10 Stat. 1132) this Court stated in *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973):

> The aim is to accommodate the rights of Indians under the treaties and the rights of other people.

We submit that in the present proceeding the courts below have ignored this Court's directive and completely debased the consistent authority of this Court in an effort to absolve feelings of collective guilt for actions taken by our ancestors against the ancestors of the current Indian population. We therefore

respectfully request the application for a writ of certiorari be granted.

DATED this 17th day of October, 1975.

Respectfully submitted,

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The Washington Reef Netters Association, a defendant-intervenor in the proceedings below, joins as a petitioner for a writ of certiorari and incorporates and adopts the petition submitted on behalf of the State of Washington, Thor C. Tollefson, Director, Washington State Department of Fisheries, Carl Crouse, Director, Department of Game, and Washington State Game Commission.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, vs. STATE OF WASHINGTON, *Defendant-Appellant*, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants*, NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED AND GARY ELLIS, *Intervenor-Defendant-Appellant*.	No. 74-2414 OPINION
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UNITED STATES OF AMERICA, *Plaintiff*, QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs*, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, on its own behalf and on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE, *Plaintiffs-Appellants*, vs. STATE OF WASHINGTON, *Defendant-Appellee*, THOR C. TOLLEFSON, etc. et al., *Intervenors-Defendants*.	No. 74-2438

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,* vs. STATE OF WASHINGTON, *Defendant-Appellant,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,* CARL CROUSE, Director of the Department of Game, the WASHINGTON STATE GAME COMMISSION, *Intervenors-Defendants-Appellants.*	No. 74-2439
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* QUINAULT TRIBE OF INDIANS, et al., *Intervenors-Plaintiffs,* vs. STATE OF WASHINGTON, *Defendant-Appellant,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Intervenors-Defendants,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, *Intervenor-Defendant-Appellant.*	No. 74-2440
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UNITED STATES OF AMERICA, *Plaintiff,* QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs,* PUYALLUP TRIBE OF PUYALLUP RESERVATION, *Plaintiff-Appellant,* vs. STATE OF WASHINGTON, *Defendant-Appellee,* THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants.*	No. 74-2602

UNITED STATES OF AMERICA, *Plaintiff*,
QUINAULT TRIBE OF INDIANS, et al., *Plaintiffs*,
NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, *Plaintiff-Appellant*,
vs.
STATE OF WASHINGTON, *Defendant-Appellee*,
THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al., *Defendants*.

No. 74-2705

[June 4, 1975]

On Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges,
and BURNS,* District Judge.

CHOY, Circuit Judge:

The United States brought this suit to enforce compliance by the State of Washington and its Departments of Game and Fisheries with certain treaties between the federal government and various Indian tribes of western Washington (treaty Indians; treaty tribes). The Government initially represented the interests of seven named tribes. Other tribes intervened, and fourteen tribes are now named parties plaintiff. Organizations of commercial and sports fishermen intervened as party defendants or participated as amici curiae.

The district court found that Washington could not apply its existing fishing regulations to members of the treaty tribes without violating their federal treaty rights. The court held that the state could enforce only those regulations necessary for conservation, decreed an allocation of fishing opportunity between treaty Indians and other citizens,[1] and retained continuing jurisdiction to provide advance judicial scrutiny of all future state regulations affect-

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

[1]"Other citizens" includes a substantial number of citizens of Indian ancestry who are no longer enrolled members of treaty tribes.

ing Indian treaty fishing rights. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974). Both sides appealed.[2] We affirm and remand.

Historical Background

In the early 1850's, an increasing flow of American settlers poured into the lowlands of Puget Sound and the river valleys north of the Columbia. Washington Territory was organized in 1853. Isaac Stevens, its first governor, was commissioned to smooth the way for settlement by inducing the Indians of the area to move voluntarily onto reservations.

George Gibbs' official chronicle of the treaty proceedings reveals the governor as a tactful and effective negotiator. He united the scattered Indian communities into a number of tribes and selected "chiefs" from each tribe with whom to bargain. The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social customs, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons. Stevens nevertheless persuaded them to settle down on designated reservations, thus freeing the great bulk of the land for American settlement without a bloody war of conquest. In exchange, he promised the tribes money and the benefits of the white man's civilization—material goods and education. Governor Stevens assured them, moreover, that they were restricted to the reservations only for the purpose of residence; he explained that they would remain free to fish off the reservations at their traditional fishing places in common with the white settlers.

In negotiating the treaties, Stevens read a predrafted document and asked for the Indians' comments and approval. Although the treaties read as typical legal documents, few if any of the Indian negotiators read or spoke English. The treaties and the Americans' explanation of their terms were translated into Chinook jargon, a trade medium of some 300 words common to most Northwest Indians. The district court found that the jargon was inadequate to express more than the general nature of the treaty provisions.

[2]The tribes have contended on appeal that the state may not regulate their fishing activities at treaty locations for any reason. Their assertion is foreclosed by the decision in *Puyallup Tribe of Indians v. Dept. of Game of Washington*, 391 U.S. 392 (1968).

During 1854 and 1855, Stevens executed treaties with all of the treaty tribes. Each treaty contained a provision guaranteeing off-reservation fishing rights similar to that found in the Treaty of Medicine Creek, 10 Stat. 1132:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

To this day, fishing remains an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. Indians have adopted modern techniques of sport and commercial fishing. They share the concern of other citizens with preservation of runs of anadromous fish. Some tribes regulate the times and manner of fishing by their members.

Decree of the District Court

The district court held that the state and its agencies can regulate off-reservation fishing by treaty Indians at their usual and accustomed grounds only if the state first satisfies the court that the regulation is reasonable and necessary for conservation. The court defined "conservation" as the perpetuation of a run or of a species of fish. The state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians. In addition, the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.

Those treaty tribes meeting certain qualifying requirements (384 F. Supp. at 340-41) may regulate fishing by their own members free from any state regulation. Qualified tribes will be required, however, to fulfill certain conditions designed to keep the state informed concerning their regulations and fishing activities. The court found the Yakima Nation and the Quinault Tribe already qualified for self-regulation.

Each year, a certain escapement of fish is necessary to preserve the run. After this escapement has been allowed by either state or tribal regulation, the remainder of the run is available for harvest. The court decreed an allocation of this harvestable run between the treaty tribes and other citizens. The state may not regulate treaty Indians' taking of this harvestable run at their

"usual and accustomed grounds and stations" unless necessary to limit them to 50 percent of the harvest at those grounds. Treaty Indians thus are to have the opportunity to take up to 50 percent of the available harvest at their traditional grounds.

The harvest to be allocated comprises not merely those fish which actually pass the traditional fishing grounds, but also those captured en route and those bound for those grounds but caught in marine waters by non-treaty fishermen. The court decreed an "equitable adjustment" to the harvestable catch to compensate for attrition from these sources. On the other hand, those fish caught by treaty Indians on reservations or taken for traditional tribal ceremonies or personal consumption by tribal members and their immediate families are to be totally disregarded in calculating the harvestable catch.

The state and its agencies challenge virtually all of these features of the district court's decision.

Federal Preemption of State Regulation

By virtue of its police power, the state has initial authority to regulate the taking of fish and game. *Geer v. Connecticut,* 161 U.S. 519 (1896). The federal government, however, may totally displace state regulation in this area. For example, Congress has the power, under the commerce clause, to authorize construction of hydroelectric facilities, even though a dam totally destroys existing runs of fish in the river in violation of the public policy of the state and the desires expressed by a majority of its enfranchised citizens. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958); *Washington Department of Game v. FPC,* 207 F.2d 391 (9th Cir. 1953), *cert. denied,* 347 U.S. 936 (1954). The federal government may also preempt state control over fish and game by executing a valid treaty and legislating pursuant to it. *Missouri v. Holland,* 252 U.S. 416, 432 (1920). Furthermore, such a treaty may preempt state law even without implementing legislation; a treaty guaranteeing certain rights to the subjects of a signatory nation is self-executing and supersedes state law. *Asakura v. City of Seattle,* 265 U.S. 332, 341 (1924). Consequently, the state may enact and enforce no statute or regulation in conflict with treaties in force between the United States and the Indian nations.

At issue, however, is not the federal government's power in executing treaties to preempt all state regulation of Indian fiishing, but whether it has in fact done so. "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148-49 (1973); *see Carey v. South Dakota,* 250 U.S. 118, 122 (1919). A treaty guaranteeing a right to fish distinct from that enjoyed by other citizens would be such an "express federal law." In deciding whether the Stevens' treaties created federal rights immune from abridgement by state law, we must read their terms against a "backdrop" of Indian sovereignty, recalling that when the treaties were signed, the United States regarded the tribes as nations, independent and sovereign. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

Although the United States dealt from a clearly superior position, the treaties were negotiated at arms' length. The treaties were not dictated to a defeated nation. The United States wished to free most of the land in the Puget Sound area for the impending white migration and settlement. Governor Stevens' task in executing the treaties was to induce the Indians to move onto reservations. The Indians expressed their concern that they would be unable to continue their traditional way of life, centered on the gathering of fish, because of limited fishing opportunities on the proposed reservations. The governor overcame their fears by promising them continued access to their traditional fishing areas off the reservations.

The treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Winans,* 198 U.S. 371, 381 (1905). The extent of that grant will be construed as understood by the Indians at that time, taking into consideration their lack of literacy and legal sophistication, and the limited nature of the jargon in which negotiations were conducted. *See id.* at 380. Although ceding their right to occupy the vast territories in which they had been accustomed to roam unimpeded, the Indians reserved their traditional right to fish at their accustomed places. They granted the white settlers the right to fish beside them. In a sense, the treaty cloaks the Indians with an extraterritoriality while fishing at these loca-

tions. Although present Indian status is not understood in terms of tribal sovereignty, recalling past acceptance of that concept aids in perceiving the Indians' understanding of the effect of the treaties which they signed. They retained the right to continue to fish as they were accustomed. Certainly, they did not understand that in permitting other citizens access to their traditional fishing areas they were submitting to future regulations calculated to benefit those other citizens.

Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory. As the non-Indian population has expanded, treaty Indians have constituted a decreasingly significant proportion of the total population, catching a decreasing proportion of a fixed or decreasing number of fish. "This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans,* 198 U.S. at 380. *See Antoine v. Washington,* 94 S. Ct. 944, 951 (1975).

In summary, the Indians negotiated the treaties as at least quasi-sovereign nations. They relinquished millions of acres of their lands, retiring to reservations carved out of those lands. But they expressly reserved their indispensable rights to fish at their traditional places. The United States obtained for the settlers and for the subsequently-admitted state only the right of equal access to these fishing grounds. The treaty provision at issue grants the state's other citizens only a limited right to fish at treaty places; it thus is "express federal law" preempting all state regulation of Indian fishing at the treaty fishing grounds, except as hereafter stated. *Compare Mescalero,* 411 U.S. at 148-49.

State Regulation for Conservation

The relationship between treaty Indians and other fishermen which these treaties created is unique. The two groups of fishermen do not share a cotenancy in the fish or in the opportunity to fish. Nevertheless, their relationship is analogous to a cotenancy, and the experience of courts in adjusting competing claims between cotenants sheds light on the interpretation of the parties' treaty rights.

Cotenants stand in a fiduciary relationship one to the other. Each has the right to full enjoyment of the property, but must use it as a reasonable property owner. A cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value. *See* Comment, *The Inter Vivos Rights of Cotenants Inter Se,* 37 Wash. L. Rev. 70, 76 (1962). A court will enjoin the commission of waste.

By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed. The state may interfere with the Indians' right to fish when necessary to prevent the destruction of a run of a particular species in a particular stream. Thus, the Supreme Court has held that the state may regulate the time and manner in which the Indians take their catch when "necessary for the conservation of fish." *Puyallup Tribe v. Department of Game of Washington (Puyallup I),* 391 U.S. 392, 399, 402 n.14 (1968); *Tulee v. Washington,* 315 U.S. 681, 684 (1942).

The state defines "conservation" to embrace three objectives and urges that it should be allowed to curtail Indian fishing in pursuit of conservation so defined: 1) allowing sufficient escapement to perpetuate the fish run; 2) assuring the maximum sustained harvest; and 3) providing for an orderly fishery. But the only rationale for permitting state interference with Indian fishing precludes adoption of this definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run. "Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival." *Department of Game of Washington v. Puyallup Tribe* (Puyallup II), 414 U.S. 44, 49 (1973).

The state's program for management of the state's fisheries may appear sound and commendable, but the state shares its rights in those fisheries with another party. It may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. The state must pursue its goals as best it can by regulating its own non-treaty Indian citizens. The state may secure treaty Indians' compliance with these regulations only by gaining their acquiescence in its goals. Direct regula-

tion of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction. *Antoine v. Washington,* 94 S. Ct. 944, 952 (1975).[3]

Tribal Self-regulation

Preservation of fishery resources is of vital importance to Indians as well as to other citizens. At the same time, regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes. These tribes have the power to regulate their own members and to arrest violators of their regulations apprehended on their reservations or at usual and accustomed fishing sites. *Settler v. Lameer,* (9th Cir., Nov. 26, 1974). The court, in its equitable discretion, decided that qualified tribes should have the power, subject to certain conditions, to regulate their own members in the interest of conservation free of state controls. So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed. We hold that the court did not abuse its discretion.[4]

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[3]The Supreme Court observed that "the State must demonstrate that its regulation is a reasonable and necessary conservation measure . . . *and* that its application to the Indians is necessary in the interest of conservation." *Antoine,* 94 S.Ct. at 952 (emphasis by the Court). This limitation on the state's police power is nullified in practice when, as here, a court has ordered an apportionment of the opportunity to take the harvestable run. By apportioning between treaty Indians and other citizens the opportunity to take all fish not needed for escapement, the court in effect requires treaty Indians to contribute to preservation of the run. To do so deprives the Indians of no rights. Both treaty Indians and other citizens share responsibility, as quasi-cotenants, for the run's perpetuation. In *Antoine,* the Court denied the state's power to *compel* the treaty tribes to assist in assuring optimum escapement; it did not question the tribes' moral or equitable duty to do so. The tribes have come to court seeking equity in allocation of the harvestable catch; the court may first require them to fulfill their equitable responsibility to allow sufficient escapement.

[4]In *Kennedy v. Becker,* 241 U.S. 556 (1916), the Court rejected a concept of "dual sovereignty" by which the state would regulate non-Indians exclusiveiy, and the tribe, Indians. The Court held that such a duality would be unworkable; either entity would be able to destroy the resource, free of check by the other. *Id.* at 563. Neither the *Settler* panel nor we advocate such a duality. The tribe possesses a power of enforce-

Apportionment of the Right to Fish

The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing. By the treaty, the Indians granted citizens of the territory the right to fish in common with them, however, and the state may enforce regulations insuring that both groups of fishermen have fair access to the fish at the treaty areas. State officials are in close daily contact with fishing conditions in Washington; they should be permitted a certain amount of flexibility in devising rules to assure both groups opportunity to exercise their rights. In so regulating, however, they must be aware that they are not enforcing state policies but applying federal rights to concrete situations. Therefore, the district court wisely insisted that proposed state regulations be submitted to it for approval before being enforced as to treaty Indians.

The treaty provides only that those Indians may fish "in common with" other citizens at the traditional grounds. The legal effect of this clause has been much disputed. The district court interpreted it as justifying an equal apportionment of the opportunity to take fish:

> [N]on-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish . . . .

384 F. Supp. at 343.

The state argues that the term "in common with" was intended merely to insure that the treaty Indians would not be treated discriminatorily, that each Indian should have access to the traditional fishing grounds on the same footing as each white settler. The Supreme Court long ago considered this construction, how-

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ment inferable from its power to regulate. *Settler* (slip op. at 13). This power does not displace that of the state; ordinarily the state and the tribe possess concurrent power to regulate Indian fishing at usual and accustomed sites so far as necessary to preserve the run. However, the district court has enjoined the state's exercise of its power in order to advance the congressional policy of promoting tribal autonomy. If tribal self-regulation proves impracticable, we are certain that the court will revise this feature of its judgment.

ever, and rejected it. *United States v. Winans*, 198 U.S. 371, 379-82 (1905).

In the early years following the signing of the treaties, a policy of providing all individuals with equal access to fishing grounds sufficiently guaranteed all parties' rights under the treaties. White civilization has since engulfed that of the Indian, however. Demand for fish has outstripped supply. By continuing to treat the outnumbered treaty Indians no differently from other citizens, the state effectively allots them a decreasing share of the resource.

A cotenant dissatisfied with his partner's exploitation of their common property may seek a partition of the property in order to protect his interest in it. Comment, *supra*, 37 Wash. L. Rev. at 77. By analogy, the Indians are entitled to an equitable apportionment of the opportunity to fish in order to safeguard their federal treaty rights. *See* ***Puyallup II***, 414 U.S. at 48-49. The district court's apportionment does not purport to define property interests in the fish; fish in their natural state remain free of attached property interests until reduced to possession. *Geer*, 161 U.S. at 529. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run.

The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public. *See Lemon v. Kurtzman*, 411 U.S. 192, 200-01 (1973); *Swann v.* ***Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 15-16 (1971). In legislative reapportionment cases, for example, the Supreme Court has been content to review and decide the broad standards (one man, one vote) dictated by the fourteenth amendment, leaving the details of the implementation of those standards to the equitable discretion of the district courts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Similarly, we propose to state only those fundamental legal principles which define the parties' respective rights, reviewing the remainder of the district court's decree only for abuse of discretion.

We affirm the conclusion of the district court that the fundamental principle to be applied in a judicial apportionment is that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. This conclusion fol-

lows naturally from the circumstances in which the treaties were signed.

The treaties must be viewed as agreements between independent and sovereign nations. *McClanahan,* 411 U.S. at 172. The "tribes" in western Washington were constructed somewhat arbitrarily by Governor Stevens for his convenience in negotiating the treaties. Each tribe in many cases was an aggregate of smaller, more natural units—communities or villages. Nevertheless, each tribe was understood to be an entity for the purpose of each treaty.

Each tribe bargained as an entity for rights which were to be enjoyed communally. *See Sac and Fox Indians (Iowa) v. Sac and Fox Indians (Oklahoma),* 220 U.S. 481, 483-84 (1911). The reservations were reserved to each tribe *qua* tribe. Not until 1887 was the President authorized to allot reservation land to individual Indians. 24 Stat. 388. Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." F. Cohen, Handbook of Federal Indian Law 183 (1942, reprinted 1971). The right to fish at usual and accustomed grounds was one such communal property right pertaining to the tribe. *Whitefoot v. United States,* 293 F.2d 658, 663 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 818 (1962); Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem,* 14 Natural Resources J. 361, 372 (1974). To hold that the Indian negotiators intended to secure for each member of the tribe the right to compete for fish on equal terms as an individual with each individual settler—the state's view of the "in common with" clause as a prototype of the fourteenth amendment's equal protection clause—thus would be to disregard the fabric of Indian society at the time the treaties were concluded, a society of communality whose nature was reflected in the subsequent legal character of property ownership which evolved in Federal Indian law. *See* F. Cohen, *supra.*

In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. An attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality. The district court was not required to

decree a perfect 50-50 division of fishing opportunity. *Cf. Mahan v. Howell*, 410 U.S. 315, 332-33 (1973); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). The court itself recognized the difficulty in practice of attaining that theoretical ideal. 384 F.Supp. at 343-44. Nevertheless, a 50-50 apportionment reflects the equality existing between the two bargaining parties and best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the time of the treaties. Thus the court's apportionment was well within its discretion.

"Equitable Adjustment"

Today, the treaty Indians' "usual and accustomed" fishing grounds in general are located upstream from sites of intensive non-treaty Indian fishing. Because the parties to the treaties did not anticipate shortages of harvestable fish, they did not foresee that downstream fishing by non-Indians would someday injure the Indians' right to fish at their usual places. Therefore, the Indians are entitled to catch 50 percent not simply of the fish passing the traditional grounds, but also of those destined for those grounds but captured dowstream or in marine waters.

The district court acknowledged the difficulty in determining with mathematical precision the number of fish bound for the tribes' fishing areas. The court recognized that a large portion of these fish are taken outside the jurisdiction of the state. Furthermore, many caught within Washington waters are taken under regulations issued by the International Pacific Salmon Fisheries Commission. On the other hand, it is reasonable to suppose that many fish appropriated beyond the state's regulatory jurisdiction are nonetheless taken by Washington citizens.

The court decreed:

> An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

384 F.Supp. at 344. We agree with the state that the court's equitable discretion does not extend so far as to permit it to compensate the tribes for the unanticipated heavy fishing by foreign ships off the coast. The treaty granted equal rights at the traditional areas to Washington citizens, and their ability to fish is equally impaired by foreign fishing. On the other hand, Washington citizens who benefit from marine catches of fish bound for traditional areas, regardless of whether they are subject to state regulation while fishing, have received a portion of the non-treaty Indian entitlement under the treaty. The court therefore may act within its equitable discretion by adjusting the number of fish which the treaty Indians have an opportunity to catch in such a way as to reflect roughly the fact that non-treaty Indian citizens have already received a portion of their share of the run past the treaty sites even before the state obtained jurisdiction over their activities.

Insofar as the 1937 convention between the United States and Canada for the protection of the Fraser River fish runs, 50 Stat. 1355, the Sockeye Salmon or Pink Salmon Fishing Act of 1947, enacted pursuant to the convention, 16 U.S.C. §§ 776-776f, and regulations issued thereunder displace the regulatory powers of the state within the state's territorial waters, fishing within those waters should be treated no differently from fishing beyond the state's territorial jurisdiction. The court therefore may adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which otherwise would be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon—or other fish affected by the Commission's regulations—at their traditional areas. Losses in the catch of those fish not regulated by the Commission caused by Commission regulation of fishing gear may also be compensated.

We reject the state's contention that the Convention and Act have "pre-empted" Indian treaty rights to harvest Fraser River salmon. The Supreme Court has indicated its extreme reluctance to find congressional abrogation of Indian treaty rights in the absence of explicit statutory language so directing. *Menominee Tribe of*

Indians v. United States, 391 U.S. 404 (1968). Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulations, but, in the absence of an explicit expression of intent to terminate treaty rights, losses to other citizens sustained through compliance with those regulations should be redressed as above stated by adding to the treaty Indians' permitted catch in areas under state jurisdiction.

Fish Taken on Reservations

The state contends that fish caught by treaty Indians on their reservations should be included in their 50 percent allocation of the catch. Analysis of the structure of a typical treaty, the Treaty of Medicine Creek, 10 Stat. 1132, is instructive. In Article I, the Indians ceded their lands to the United States. In Article II, however, the treaty reserved "for the present use and occupation of the said tribes and bands, the following tracts of land. . . ." Finally, in Article III, "[t]he right of taking fish, at all usual and accustomed grounds and stations, is *further* secured to said Indians, in common with all citizens of the Territory. [Emphasis added]"

The right to take fish in common with the settlers off the reservations was a right reserved by the Indians in addition to their right to occupy and use reservation land. The settlers obtained no analogous rights on the reservations. Other citizens clearly have no more claim to a share of the fish caught on the reservations than they do to a right to reside on those reservations. The court thus did not abuse its discretion in excluding fish caught on the reservations from the apportionment.

We also affirm its decision, uncontested by the state, that fish taken off the reservation and actually used for traditional tribal ceremonies or for personal subsistence consumption by members of the tribe and their families shall not be counted in the apportionment.

Lummi Reef Net Fishing

The conflict between the Lummi Tribe and the non-treaty Indian reef net fishermen involves elements not found among the other tribes. Reef nets are installed at various locations in the

sound, parallel to the shoreline from about 125 to about 1,300 yards from shore.[5] Locations differ greatly in their productivity. The technique of reef net fishing was developed by the Indians, who used nets between reefs close to shore. Modern reef netting is far more sophisticated, making use of artificial "reefs" and heavy equipment, and is practical in deeper waters farther from shore. The court found that the fish had been driven from shallower waters by the whites' use of fish traps, now illegal, and by the widespread use of other fishing gear in the areas formerly devoted to Indian reef nets.

Reef net fishermen by gentlemen's agreement retain exclusive occupancy of a given location until they sell or otherwise dispose of their equipment. The court found that all Lummi reef net fishermen had been squeezed out of the fishery. At present, therefore, a member of the Lummi Tribe can reef net in a profitable location only by purchasing, at considerable expense, a non-treaty Indian's fishing gear.

The district court found that the present reef net areas are within the usual and accustomed grounds and stations of the Lummi Indians, and that the Lummis had a right to an opportunity to fish in those areas. The court, however, deferred for later consideration the specific relief to be afforded the Lummis at the expense of present occupants of reef net locations.

Reef net fishing is distinguishable from other forms of fishing in two important respects. First, only a finite number of profitable positions are available, each occupied at present by a white fisherman who is recognized by his fellow fishermen as owning a quasi-property interest in the site, an interest appurtenant to his ownership of his fishing gear. Any assignment of positions to treaty Indian fishermen must break down the present exclusive occupancy system. Second, and more important, the court found that:

> Reef net locations were owned [at the time of the treaty] by individuals who claimed proprietary rights by virtue of inheritance in the male line. These locations constituted very valuable properties to their native owners. . . . Some of the Lummi signers of the treaty were owners of reef net loca-

[5]This fact was determined from inspection of the aerial photos admitted by the District Court as exhibits RN 7 and RN 11.

> tions. Lummi Indians who were present at the Point Elliott Treaty Council later asserted that the Lummi signers had received assurances there that they would continue to hold the rights to their fishing grounds and stations, including their reef net locations.

384 F. Supp. at 361. The right to fish with reef nets was thus not a tribal right, as was other fishing, but one guaranteed to specific individuals.

The individual Indian's proprietary relationship with a specific reef net location presents an aberration from the general communal pattern of Indian property ownership. Nevertheless, the Treaty of Point Elliott must be interpreted with reference to the general pattern of ownership among the tribes subscribing to it, not to the aberrational.

The fact that, in general, Indians held property communally has led the courts to hold that property rights, vis-a-vis the United States, are vested in the tribe, not in the individual. Disputes among members of the tribe are left for the tribe to adjust internally. *See Whitefoot v. United States*, 293 F.2d 658, 661-63 & nn. 8 & 9 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962).[6] In *Whitefoot*, for example, scarcity of good fishing locations at Celilo Falls on the Columbia river presented a similar situation. There, also, individual Indians had exercised an exclusive, hereditary right to fish certain choice locations. Nevertheless, the Court of Claims held that damages for inundation of the falls by federal construction of a dam were recoverable only by the tribe, not by individual tribal members. Similarly, no matter how Lummi fishermen held reef net locations according to tribal custom, so far as the United States is concerned, under the treaty the right to engage in reef net fishing belongs to the Lummi tribe. Therefore, fishing in the usual and accustomed reef net areas is subject to the same prin-

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[6]The concept of "property" can scarcely exist outside a legal framework. We are reluctant to force whatever notions of rights and duties regarding fishing locations were held by Indians in 1854 into an Anglo-American mold of "property rights." We are especially reluctant to do so when the tribe still exists with which we can deal as an intermediary, allowing it to arbitrate among the conflicting claims of its members according to the values and customs of their own culture.

ciple of equal division as is that in other usual and accustomed areas.

The non-Indian reef net fishermen maintain that today's fishing areas are not part of the Lummis' usual and accustomed areas. They assert that present reef netting is conducted in deeper water than that fished by the Lummis before the treaty was signed. The court, on the other hand, found that some present-day reef net gear is located directly upon traditional sites. It held that the "Lummi Tribe continues to hold treaty-secured rights to fish with reef net gear in its usual and accustomed places, including Legoe Bay off Lummi Island . . . ." 384 F. Supp. at 404. The court also found that:

> Since the turn of the century, the heavier volume of fish in the vicinity of Legoe Bay traveled close to shore. This has changed so that now fish must be taken in deeper water. This has been caused by the installation of traps [until they became illegal under state law] and the present abundance of other fishing gear in the reef net area. . . . In aboriginal times, Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including operation of the reef nets.

Id. at 361-62. Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a sufficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

In fashioning equitable relief for the Lummis, the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen.

Muckleshoot Tribe

The Muckleshoot Indian Reservation, named after the prairie on which it is located, was established in 1857, two years after the treaties were signed. It was occupied by Indians who earlier

had been represented at Medicine Creek and at Point Elliott, as well as by some Indians who apparently were parties to neither of those treaties. The reservation was an arbitrary grouping; no Muckleshoot Tribe had previously existed. Nevertheless, the inhabitants of the reservation today are recognized as a tribe by the United States. The district court recognized the Muckleshoots as a treaty tribe. We agree.

The state refused to recognize membership in the tribe as conferring federal treaty rights. The Washington Supreme Court has held that a member of the Muckleshoot Tribe must establish that he is descended from a tribe or band which was represented at the signing of one of the treaties if he is to be accorded treaty rights. *State v. Moses*, 70 Wash.2d 282, 422 P.2d 775, *appeal dismissed*, 389 U.S. 428 (1967).

The Interior Department instructed Governor Stevens "to effect [if possible] the combination of all the Bands into six or eight Tribes, [and] to arrange half a dozen treaties or less, so that every one of the Tribes shall be a party to one of them." Exhibit USA 28. In the Treaty of Medicine Creek, 10 Stat. 1132, the tribes ceded all the land from the divide between the Puyallup and Duwamish rivers south to the Skookumchuck river, from the Sound to the crest of the Cascades. In the Treaty of Point Elliott, 12 Stat. 927, they ceded the land from the northern boundary of the territory ceded at Medicine Creek north to the Canadian border. Governor Stevens clearly believed that, except for those lands designated as reservations, he had successfully acquired the territorial rights of all the tribes in that vast area; and the district court found that the government has consistently treated the present-day Muckleshoot Tribe as the successor in interest of those of its constituent tribes which had been represented in the two treaties.

The state's principal fear seems to be that members of the Muckleshoot Tribe will be able to use the traditional areas of all the merged tribes, affording them special rights. The argument is specious. The member of every tribe composed of smaller bands possesses rights similarly more extensive than those of any one of his direct ancestors. The treaty Indians are restricted to the opportunity to take up to 50 percent of the harvestable catch at traditional areas. Each Indian can fish at but one location

at a time, so the state's concern that he is accorded double the treaty rights to which he is entitled is unfounded.

Stillaguamish and Upper Skagit Tribes

The Stillaguamish and Upper Skagit Tribes were parties to the Treaty of Point Elliott, but today are not recognized as organized tribes by the federal government. Rights under the treaties vested with the tribes at the time of the signing of the treaties. Non-recognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine. *Cf. Upper Chehalis Tribe v. United States*, 155 F. Supp. 226 (Ct.Cl. 1957). Once a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968). Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Conclusion

The decision of the district court is affirmed in all respects, with the clarification that its "equitable adjustment" should not take account of fish caught by non-Washington citizens outside the state's jurisdiction. The case is remanded to the district court so that it may maintain continuing jurisdiction.

Affirmed and remanded.

BURNS, District Judge, concurring:

I concur, but I want to add a brief comment from the viewpoint of a district judge. As was suggested at oral argument, any decision by us to affirm also involves ratification of the role of the district judge as a "perpetual fishmaster." Although I recognize

that district judges cannot escape their constitutional responsibilities, however unusual and continuing duties imposed upon them, I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments, and so on. The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-9-75—550

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

QUINAULT TRIBE OF INDIANS, et al.,

Intervenors-Plaintiffs,

vs.

STATE OF WASHINGTON,

Defendant-Appellee,

THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, et al.,

Defendants.

Order No.

74-2414, 2437, 2438, 2439, 2440, 2567, 2602, 2705

On Appeal from the United States District Court, for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Goodwin voted to reject the suggestion for rehearing en banc, and Judge Burns recommended rejection.

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

However, the opinion heretofore filed is amended in the following particulars:

1) Amend the last sentence of the first paragraph on page 3 of the slip opinion to read:

> "Organizations of commercial and sports fishermen intervened as parties defendant or participated as amici curiae."

2) Amend the sentence running from page 16 to page 17 to read:

> "Reef nets are installed at various locations in the Sound parallel to the shoreline from about 125 to about 1300 yards from shore."

3) Amend footnote 5, page 17, to read:

> "This fact was determined from inspection of the aerial photographs admitted by the district court as exhibits RN 7 and RN 11."

Filed July 23, 1975.
Docketed Aug. 4, 1975.

UNITED STATES of America, Plaintiff,

Quinault Tribe of Indians on its own behalf and on behalf of the Queets Band of Indians, et al., Intervenor-Plaintiffs,

v.

STATE OF WASHINGTON, Defendant,

Thor C. Tollefson, Director, Washington State Department of Fisheries, et al., Intervenor-Defendants.

Civ. No. 9213.

United States District Court,
W. D. Washington at Tacoma.

Feb. 12, 1974.

STATEMENT OF THE CASE

BOLDT, Senior District Judge.

In September, 1970 the United States, on its own behalf and as trustee for several Western Washington Indian Tribes,[1] later joined as intervenor plaintiffs by additional tribes,[2] filed the complaint initiating this action against the State of Washington. Shortly later the State Department of Fisheries (Fisheries) and the State Game Commission (Game), their respective directors, and the Washington Reef Net Owners Association (Reef Net Owners) were included as defendants. By state statute Fisheries is charged with exercising regulatory authority over fishing for all anadromous food fish. Regulation of anadromous steelhead trout is vested in Game. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 concerning off reservation treaty right fishing within the case area by plaintiff tribes, which long has been and now is in controversy, and for injunctive relief to provide enforcement of those fishing rights as they previously have been or herein may be judicially determined. The case area is that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River

[1]Hoh Tribe; Makah Tribe, Muckleshoot Tribe; Nisqually Tribe; Puyallup Tribe; Quileute Tribe; Skokomish Tribe.

[2]Lummi Tribe; Quinault Tribe; Sauk-Suiattle Tribe; Squaxin Island Tribe; Stillaguamish Tribe; Upper Skagit River Tribe; Yakima Nation.

drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas.

Plaintiffs also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams. Separation of those claims for pretrial and trial after trial of the issues determined in this decision was stipulated and approved by the court.

Venue is properly laid in this court under 28 U.S.C. § 1391(b). Jurisdiction is alleged as to all tribes under one or more of the following provisions: 28 U.S.C. §§ 1345, 1331, 1343,(3) and (4) and 1362.[3] All of these allegations were conceded by all defendants, subject to their contention that exclusive jurisdiction to hear and determine the issues in this case is in the Indian Claims Commission under 25 U.S.C. §§ 70-70v and Game's denial of jurisdiction as to the Puyallup Tribe. This court has previously held and hereby affirms that both of these contentions are without merit and denied. It is hereby found and held that jurisdiction and venue have been established in all particulars as detailed in Part One of the Final Pretrial Order.

Fisheries contends the Muckleshoot, Stillaguamish and Upper Skagit tribes do not hold a special treaty status to harvest anadromous fish. Game joins in this contention and makes the same contention regarding the Sauk-Suiattle Tribe. These contentions are considered and denied in the written Findings of Fact and Conclusions of Law.

Shortly after appearance in the action by all defendants the first of a considerable number of pretrial conferences was held. Among many preliminary matters considered at that time were the court's suggestions that so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest in treaty fishing rights in this judicial district be brought into the case either as parties or as amicus curiae; and that every issue of substantial direct or indirect significance to the contentions of any party be raised and adjudicated in this case. Both suggestions were acceptable to all parties and to a great extent they have been put into

[3]See Final Pretrial Order paragraph 1.

effect. Thus every interested agency and organization not joined as a party has had an opportunity to present its views on any of the issues in the case.[4]

For more than three years, at the expenditure by many people of great time, effort and expense, plaintiffs and defendants have conducted exhaustive research in anthropology, biology, fishery management and other fields of expertise, and also have made extreme efforts to find and present by witnesses and exhibits as much information as possible that pertains directly or indirectly to each issue in the case. As a consequence of this extensive pretrial preparation, all parties joined in stipulating to a great many agreed facts which are stated in exhibits or included in the Final Pretrial Order. The Joint Biological Statement, Exhibit JX-2a, jointly proposed and admitted in evidence as agreed facts applicable as indicated therein, was prepared by and agreed to by highly qualified experts employed by and representing both plaintiffs and defendants and is of exceptional importance and practical value. It is believed considerable historic and scientific information never before presented in a case involving treaty rights is now recorded and may prove of value in later proceedings in this case and possibly in others.

To great advantage, all procedures recommended in the Manual for Complex Litigation have been followed by counsel in the particulars and to the extent found applicable and practicable by the court. With approval of court and counsel upon its entry the Final Pretrial Order became the final statement of all issues to be heard and determined in this decision, and pleadings pertaining to those issues passed out of the case, subject only to amendment by the court to prevent manifest injustice. Such amendments have been included in the text of the Final Pretrial Order.

Every attorney in the case has vigorously and effectively presented the particular interests and contentions of each client he represents to the maximum extent professional duty requires. On the other hand there has been a remarkable degree of highly respon-

[4]The following agencies or organizations have submitted, or concurred in written briefs: Idaho Fish & Game Department; Port of Seattle; Washington State Sportsmen's Council, Inc.; Northwest Steelheaders, Inc.; Committee to Save Our Fish; Tacoma Sportmen's Club, Inc.; Tacoma Poggie Club, Inc.; Purse Seine Vessel Owners Association.

sible and most commendable cooperation on the part of all counsel throughout trial preparation and trial which has greatly expedited discovery and full presentation of the issues and evidence in the case. All of the legal issues have been researched in depth and effectively presented and argued in the pretrial briefs, and in the final briefs submitted after the presentation of evidence was concluded and before final argument, which also was exceptional in professional quality. By direction of the court all parties either individually or jointly, as they chose, prepared and submitted proposed findings of fact and conclusions of law referenced to the record and also drafts of a proposed decree. Each proposed finding, conclusion and decree has been closely examined and considered by review of the evidence and the portions of the briefs pertaining to each item. All fact findings and legal rulings stated herein and the detailed Findings of Fact, Conclusions of Law and Decree signed and entered by the court are hereby made a part of this decision.

On January 11, 1974, when Game filed the final version of its proposed findings, conclusions and decree the issues tried were finally submitted for decision.

This court is confident the vast majority of the residents of this state, whether of Indian heritage or otherwise, and regardless of personal interest in fishing, are fair, reasonable and law abiding people. They expect that kind of solution to all adjudicated controveries, including those pertaining to treaty right fishing, and they will accept and abide by those decisions even if adverse to interests of their occupation or recreational activities.

More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing has resulted in deep distrust and animosity on both sides. This has been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

To this court the evidence clearly shows that, in the past, root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other

and act as fellow citizens of equal standing as far as treaty right fishing is concerned. Some commendable improvement in both respects has developed in recent years but this court believes high priorty should be given to further improvement in communication and in the attitude of every Indian and non-Indian who as a fisherman or in any capacity has responsibility for treaty right fishing practices or regulation. Hopefully that will be expedited by some of the measures required by this decision.

The ultimate objective of this decision is to determine every issue of fact and law presented and, at long last, thereby finally settle, either in this decision or on appeal thereof, as many as possible of the divisive problems of treaty right fishing which for so long have plagued all of the citizens of this area, and still do.

I. ESTABLISHED BASIC FACTS AND LAW

(Hereinafter italicize emphasis added unless otherwise indicated)

The first decision of the United States Supreme Court on Indian treaty rights, Cherokee Nation v. Georgia, 5 Pet. 1, 30 U.S. 1, 8 L.Ed. 25, was written by Chief Justice Marshall in 1831. Since then decisions on the same subject matter have been rendered in that court, other federal courts and state courts in a considerable number to the present time.[5] All of the decisions that appear to have direct or indirect application to the present case have been closely reviewed and analyzed, individually and in relation to each other. Based thereon this court finds and holds that the following statements are now well established in fact and law.

1. Art. VI, cl. 2 of the United States Constitution provides:

> The "Constitution . . . of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. To the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the

[5]The Table of cases appended hereto includes only all cases which have been cited by any party as authority pertaining to any issue in this case and other cases considered by the court. In the table, the abbreviated title of each case referred to in the decision is italicized.

means to aquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved to be ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.[6]

In 1899 the United States Supreme Court in considering a similar situation said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. Worcester v. Georgia, 6 Pet. 515 [8 L.Ed. 483]; The Kansas Indians, 5 Wall. 737, 760 [18 L.Ed. 667]; Choctaw Nation v. United States, 119 U.S. 1, 27, 28 [7 S.Ct. 75, 30 L.Ed. 306, 314, 315] . . . . 'The language used in treaties with the Indians should never be construed to their prejudice.' . . . 'How the words of the treaty were under-

[6]Exhibit (Ex) USA-20, pp 24-29; Finding of Fact (FF) #2.

stood by this unlettered people rather than their critical meaning, should form the rule of construction.' "[7]

In 1905 the above principles were reiterated in *Winans* (198 U.S. p. 380, 25 S.Ct. p. 664):

"And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' [citing *Choctaw* and *Jones*]"

3. The United States Supreme Court in *Missouri* (252 U.S. p. 434, 40 S.Ct. p. 384) stated:

"Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.' Baldwin v. Franks, 120 U.S. 678, 683, 7 S.Ct. 656, 32 L.Ed. 766."

4. Each of the basic fact and law issues in this case must be considered and decided in accordance with the treaty language reserving fishing rights to the plaintiff tribes, interpreted in the spirit and manner directed in the above quoted language of the United States Supreme Court. Each treaty in this case contains a provision substantially identical to that in the Medicine Creek treaty: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing, . . ."[8]

5. "The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . [T]he treaty was not a grant of rights to the Indians but a grant of right from them—a reservation of those not granted."[9]

"And surely it was within the competency of the Nation to

[7]*Jones*, 175 U.S. at 10, 11, 12, 20 S.Ct. at 5; other decisions by the same court containing the same or similar language: *Cherokee, Worcester, Kansas Indians, Winans, Kennedy, Seufert, Tulee*.

[8]Text of all treaties FF #1.

[9]U.S.Sup.Ct. in *Winans*, 198 U.S. at 381, 25 S.Ct. at 664.

secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' "[10]

6. ". . . [T]he [treaty] negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. . . . And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees."[11] That those rights are also reserved to the descendants of treaty Indians, without limitation in time, excepting as Congress may determine, has been recognized and applied by the United States Supreme Court from the first to the latest decision of that court involving Indian treaty fishing rights.

7. An *exclusive* right of fishing was reserved by the tribes within the area and boundary waters of their reservations,[12] wherein tribal members might make their homes if they chose to do so. The tribes also reserved the *right* to off reservation fishing "at all usual and accustomed grounds and stations" and agreed that "all citizens of the territory" might fish at the same places "in common with" tribal members. The tribes and their members cannot rescind that agreement or limit non-Indian fishing pursuant to the agreement. However, off reservation fishing by other citizens and residents of the state is not a *right* but merely a *privilege* which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

8. The tribes reserved the right to fish at *"all* usual and accustomed grounds and stations." The words "grounds" and "stations" have substantially different meanings by dictionary definition and as deliberately intended by the authors of the treaty. "Stations" indicates fixed locations such as the site of a fish wier or a fishing

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[10]Id. at 384, 25 S.Ct. at 665.

[11]Id. at 381-382, 25 S.Ct. at 664.

[12]This proposition is not denied or challenged by any party in this case. As previously stated in paragraph 4 of the text, the fishing clauses are substantially identical in the treaties of all plaintiff tribes. The fishing clause in the Yakima treaty applies the word "exclusive" to on reservation fishing. Although the word is used in the same context in several other treaties not involved in this case it does not appear in the treaty of any other plaintiff tribe. However, in every case involving a fishing clause substantially similar to that quoted in the text of this decision in which "exclusive" is not present, without exception the United States Supreme Court has assumed that on reservation fishing *is* exclusive and has interpreted and applied similar fishing clauses, as though the word "exclusive" was expressly stated therein as in the Yakima treaty. Research has not disclosed any reported decision to the contrary.

platform or some other narrowly limited area; "grounds" indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined. "Usual and accustomed," being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions. Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.[13]

II. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This summary of the 253 separate detailed Findings of Fact and 48 Conclusions of Law filed herewith is intended as a recital of only the principal categories thereof, several of which are discussed elsewhere in this opinion.

The Findings of Fact set forth the treaties under which each tribe, or its predecessors, negotiated with the United States, and in which the Indians expressly reserved the right to fish at off reservation usual and accustomed fishing places. The pretreaty role of fishing among Northwest Indians is outlined, emphasizing the universal importance of the fishery resource, particularly salmon and steelhead, to Indians in the case area as an element of diet and in religious practices and trade. The Northwest Indians developed a wide variety of fishing methods which they utilized to catch many varieties of fish at innumerable locations throughout the areas where they lived and traveled.

In the mid-1850's the United States treated with the unlettered Northwest Tribes to acquire great expanses of land. Reluctant to be confined to small reservation bases, the Indian negotiators insisted that their people continue to fish as they had beyond the reservation boundaries. There is no indication that the Indians intended or

[13] *Seufert* and see F.F. 10 and 13.

understood the language "in common with all citizens of the Territory" to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing.

For each of the plaintiff tribes, the findings set forth information regarding the organization and membership of the tribe, and some, but by no means all, of their principal usual and accustomed fishing places. Anthropological data are also presented for several tribes, as well as information concerning present Indian culture and economy. Several tribes are currently involved in fish propagation programs which benefit the tribes and the state.

Fact findings are also presented regarding reef net fishing which show that current non-Indian reef net operations take place at or near the same locations occupied historically by Lummi Indian fishermen.

General fisheries conservation and management data are presented, incorporating the Joint Biological Statement which sets forth many significant facts concerning anadromous fish. Procedures and objectives are outlined for managing salmon and steelhead for commercial, sport and Indian user groups including regulatory schemes promulgated by state authorities and by Indian tribes. The means and locations used to harvest the resource and the quantity of the harvest are also presented.

The policies and practices of both Fisheries and Game are also presented. Due in part to the nature of the species of fish regulated, Fisheries evidences better success in managing the salmon than does Game with regard to steelhead. Fisheries has also evidenced an attitude of cooperation with the plaintiff tribes that has been lacking from Game, at least prior to *Puyallup-II*.

The Conclusions of Law, after stating the basis of jurisdiction and venue, establish the treaty status of each of the plaintiff tribes, and therefore, the right of their members to fish off reservation in common with the citizens of the state. The fishing right was reserved by the Indians and cannot be qualified by the state. The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. For this purpose, conservation is defined to mean per-

petuation of the fisheries species. Additionally, state regulation must not discriminate against the Indians, and must meet appropriate due process standards.

The Yakima Nation and the Quinault Tribe are presently qualified to self-regulate the off reservation fishing of their tribal members. Other tribes may similarly self-regulate member fishing if and when they meet the qualifications and conditions set forth in the decision.

Several current state laws and regulations which restrict the time, place, manner and volume of off reservation fishing by treaty tribes, and reserve game fish for sport interests, have not been established as reasonable and necessary for conservation and the application thereof to plaintiff tribes is unlawful. The court will retain continuing jurisdiction of this case to grant such further relief as the court may find appropriate.

III. STATE REGULATION OF OFF RESERVATION TREATY RIGHT FISHING

There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in any other credible evidence, that the Indians who represented the tribes in the making of the treaties, at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorize the "citizens of the territory" or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the full *exercise* of those rights. All of the evidence is overwhelmingly to the contrary, particularly in the vivid showing in the record that the treaty Indians pleaded for and insisted upon retaining the *exercise* of those rights as essential to their survival. They were given unqualified assurance of that by Governor Stevens himself without any suggestion that the Indians' *exercise* of those rights might some day, without authorization of Congress, be subjected to regulation by non-Indian citizens through their territorial or state government.[14]

For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by

[14]Ex. USA-20 pp 24-29, 42-43; FF #2.

fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization.[15]

In the final pretrial order in this case issues were raised therein by the contentions of several tribes later joined by the remaining plaintiff tribes that: (a) the state police power dicta followed by the United States Supreme Court are not sound in legal logic or principle, and (b) even if so, state regulation of the exercise of Indian off reservation treaty fishing rights must be denied in "justice and reason, looking to the substance of the rights reserved as understood by the Indians who negotiated the treaties, without regard to technical rules," as all American courts for a century or more have been repeatedly admonished by the United States Supreme Court in the same or similar language.[16]

In addition to raising the above stated issues in the final pretrial order, the tribes have submitted well researched briefs and vigorous oral argument in support thereof. That the contentions are not without at least color of merit in judicial and scholarly support is shown by a decision of the Supreme Court of Idaho,[17] the judicial views of at least one highly respected Washington State Supreme Court Judge[18] and a scholarly article in The University of Washington Law Review written by a Law Professor of that University and other similar articles.[19]

No federal decision or state decision cited to this court has directly and specifically interpreted the clause "in common with all citizens of the Territory" as, in itself, directly or impliedly justifying

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[15]Ex. USA-20, pp 39-42; FF #2.

[16]See footnote 7.

[17]*Author.*

[18]Donworth dissenting in *McCoy* (p. 439, 378 P.2d 942) and *Game-I* (70 Wash.2d p. 263, 422 P.2d 754); and in *Satiacum* (50 Wash.2d p. 529, 314 P.2 400) a 4-4 decision.

[19]R. Johnson, 47 U.Wash.L.Rev. 207 (1972); C. Hobbs, 37 Geo.Wash. L.Rev. 1251 (1969); Comment, 59 U.Calif.L.Rev. 485 (1971).

state police power regulation of off reservation treaty right fishing, or has specifically stated or even indicated any federal source of or basis for such state power.

Under these circumstances and the facts hereinabove recited, judicial integrity requires that this court must give the tribes' above stated contentions serious consideration and specific determination.

The first decision of the United States Supreme Court, later cited by the same court as authority for state regulation of treaty right fishing, is *Ward*. On that subject unquestionably the decision was obiter dictum because: (a) the Indian hunting rights reserved in the treaty in question were limited to specifically designated areas outside of which Race Horse hunted, for which he was imprisoned and from which he sought enlargement by habeas corpus; and (b) because later in the opinion it was held the treaty hunting rights in question had been finally terminated by Congress prior to the allegedly criminal hunting by Race Horse.

The only statement in *Ward* in either the majority or minority opinions that could possibly justify later citation of the decision as applicable to treaty right fishing was the single sentence 163 U.S. on page 507, 16 S.Ct. on page 1076:

> "The power of a state to control and regulate the taking of game cannot be questioned. Geer v. Connecticut, 161 U.S. 519, [16 S.Ct. 600, 40 L.Ed. 793]."

However, in the next preceding paragraph of the majority opinion in *Ward* two sentences before the sentence just quoted, the majority opinion stated:

> ". . . the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein (the treaty) referred to within the limits of the state of Wyoming in violation of its laws. If it [the treaty] gave such right, the mere fact that the state had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands *than could passage of the* [*state*] *game law*."

This statement, even if it too be a dictum, is far more sound in treaty law applicable to fish and game regulation than the first statement quoted above.

Thus the second statement in *Ward*, quoted in the paragraph

above to the effect that exercise of treaty right hunting cannot be controlled by state regulatory laws would appear to be compelling, or at least equal, authority for denying state regulation, not authorized by Congress, of Indian fishing off reservation as specified in existing treaties which expressly record and recognize reservation of that right by the Indian tribes.

In *Geer*, Mr. Justice White, speaking for a 5-2 majority traced in detail principles pertaining to the taking of *ferae naturae* down through the ages from Solon of ancient Athens to 1895, but treaty rights were not involved in that case or even mentioned in any way whatever in the exhaustive opinion. The only issue decided in *Geer* was the holding that it was not unconstitutional for Connecticut to allow, by regulation, killing of birds within the state during a designated open season, and to permit such birds, when so killed, to be used, sold and bought for use within the state, but forbid their transportation beyond the state. Hence the statement in *Geer* as well as that in *Ward*, on the subject of off reservation treaty right fishing, were both purest dicta.

Ward was not cited in *Winans*, wherein state power to regulate off reservation treaty fishing was assumed without any explanation or citation of authority. That subject was mentioned only in the concluding clause of a sentence (198 U.S. p. 384, 25 S.Ct. p. 665):

> ". . . nor does it [the right to take fish] restrain the state unreasonably, if at all, in the regulation of the right."

Geer, Ward, Patsone and *Lacoste* are cited in footnote #2 of *Tulee* (315 U.S. p. 683, 62 S.Ct. 864) as supporting the only statement in that opinion referring to the state power to regulate off reservation fishing:

> "Relying upon its broad powers to conserve game and fish within its borders, (2) however, the state asserts that its right to regulate fishing may be exercised at places like the scene of the alleged offense, which, although within the territory originally ceded by the Yakimas, is outside of their reservation."

In *Patsone* the United States Supreme Court reviewed the conviction of an alien for possession of a shotgun in violation of a state criminal statute. One of the two defenses presented and determined in the decision was based on provisions of a United States treaty with Italy. The treaty provisions and facts in *Patsone* are totally dissimilar to those in the present case and nothing in the

holdings or language in the opinion directly or by implication would legally authorize state regulation of a federally guaranteed civil right which is expressly stated in a treaty and the exercise of which right could not possibly endanger the personal safety of any resident of the State.

Treaty rights were in no way involved in *Lacoste*. The only statement in that decision (263 U.S. p. 549, 44 S.Ct. 186) concerning state police power to regulate the taking of wild animals is supported by citation of *Geer*, *Ward*, *Kennedy* and other decisions having only remote applicability in either fact or law to the present case.

The remaining treaty right fishing decisions of the United States Supreme Court are *Puyallup-I* and *Puyallup-II*. Thus until *Puyallup-I* was decided in 1968 there was neither judicial analysis nor citation of a non-dictum decision supporting police power state regulation of the exercise of Indian off reservation treaty right fishing in any Supreme Court decision because all previous Supreme Court references to that subject were either based solely on the reiterated dicta discussed above or assumed such authority without discussion of its basis or indication of its source.

In support of a statement in *Puyallup-I* (391 U.S. p. 399, 88 S.Ct. 1725) concerning state regulation of treaty fishing outside of reservations the United States Supreme Court cited *Winans* and *Kennedy* as forerunners of *Tulee* and quoted portions of all three. As indicated above herein, the *Tulee* and *Winans* quotations were dicta.

In *Kennedy*, a habeas corpus proceeding, Indian lands were transferred by the Seneca Tribe to private ownership in a 1797 treaty containing a provision which permitted the Seneca Indians to fish in waters on the lands conveyed "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York." Shortly after that conveyance the lands were resold and continued in private ownership to the time of *Kennedy*, decided in 1915. That decision cites *Geer* and *Ward* as the sole basis for its statement (241 U.S. p. 562, 36 S.Ct. p. 707) that "it is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state . . . ." *Kennedy* paraphrases *Winans* for more than *Winans*

held and quotes the same passing reference to regulation in *Winans* previously quoted above.[20] Most significant of all, it is stated in the very *Kennedy* language quoted in *Puyallup-I* (391 U.S. pp. 399-400, 88 S.Ct. p. 1729) that the fishing clause in the treaty conveyance "is fully satisfied by considering it a reservation of a *privilege* of fishing . . ." subject to state regulation. If at this time anything concerning treaty fishing rights should be beyond doubt or question it is the basic principle that the treaty fishing of plaintiff tribes in this case is a reserved *right* and not a *mere privilege*. The treaty fishing in *Kennedy* was held to be only a *privilege* under the peculiar facts of that case. Nothing faintly comparable to those facts can be found in either *Puyallup-I* or the present case.

Another statement in *Puyallup-I* (391 U.S. p. 398, 88 S.Ct. p. 1728) concerning police power regulation, without analysis other than as stated therein, or citation of a non-dictum authority, is:

> "Moreover, the right to fish at those respective [usual and accustomed] places is not an exclusive one. Rather it is one 'in common with all citizens of the territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."

This statement seems to say that because a state has police power to regulate fishing *privileges* which the state has granted and may limit or entirely withdraw, that is somehow a legal reason for state regulation of federal fishing *rights* which are expressly reserved in a treaty which only Congress has authority to limit or modify. If that seeming non sequitur be the law it certainly is deserving of more specific legal analysis and justification than it has ever had in any United States Supreme Court decision.

In *Puyallup-I* it is also stated (391 U.S. p. 398, 88 S.Ct. p. 1728):

> "The *right* to fish 'at all usual and accustomed' places *may, of course, not be qualified by the State,* even though all Indians born in the United States are now citizens of the United States. [citations] But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

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[20]". . . nor does it restrain the state unreasonably, if at all, in the regulation of the right." (198 U.S. p. 384, 25 S.Ct. p. 665)

That a treaty *right*, guaranteed as the supreme law of the land by the Federal Constitution, can not be "qualified" (i.e. "in some way limited or modified")[21] by a state but the *exercise* of the right may be limited or modified by state regulation, especially when these seemingly conflicting propositions are stated in consecutive sentences, is very difficult to comprehend. The practical effect of a difference between *having* a constitutional right but only a limited right to *exercise* it certainly could not have been understood and accepted by the "unlettered" Indians who negotiated the treaties and it must be little less impossible for their somewhat more sophisticated present-day descendants to comprehend and accept.

Mindful that treaty fishing is a right, not a mere privilege, the following sentence from *Murdock*, quoted in a footnote (p. 402, 88 S.Ct. p. 1730) of Puyallup-I, seems pertinent:

> "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

As stated by the United States Supreme Court in *Winans* (198 U.S. pp. 381-382, 25 S.Ct. 662), treaty fishing rights are personal rights held and exercised by individual tribe members. Although the exercise of that particular civil treaty right may be limited or modified in any particular or to any extent by or with authority of Congress,[22] that the exercise of such a right may be limited in any way by the police power of a state, without having previously received authority to do so from Congress, seems to be diametrically opposed to relevant treaty law and personal civil rights decisions, particularly those of recent years.

In the *Puyallup-II* decision, decided less than three months ago, it was stated (414 U.S. p. 2, 94 S.Ct. p. 332):

> "The sole question tendered in the present cases concerns the regulations of the Department of Game concerning steel head trout."

Other than by recital or quotations from *Puyallup-I* and State Supreme Court decisions, in *Puyallup-II* there was no discussion of or ruling upon the basis of state police power to regulate off reservation treaty right fishing unless it be derived from the next to the

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[21]Webster's Third New International Dictionary of the English Language, 1961 Ed. (p 1858)

[22]*Lone Wolf* citing other Supreme Court decisions to the same effect.

last paragraph in the opinion of Justice Douglas (pp. 5-6, 94 S.Ct. p. 333):

> "We do not imply that these fishing rights persist down to the very last steel head in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steel head is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steel head from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steel head until it enters their nets."

Whatever the above quoted statement may have added to or taken from the right to exercise the off reservation treaty fishing rights of the plaintiff tribes, to the present time there never has been either legal analysis or citation of a non-dictum authority in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

From the above summary of the United States Supreme Court decisions it is clear the following 1971 comment by the Washington State Supreme Court[23] is not overstated:

> "Surprisingly little judicial attention, we note, has been given to this rather standard treaty language [in the fishing rights clause of Indian treaties]."

It also appears that the United States Supreme Court has exercised a prerogative specifically reserved by and to Congress in the treaties. Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights.[24] It may be that the refusal or failure of Congress to exercise a specific prerogative, by enactment of legislation, would legally justify judicial exercise of that particular prerogative. If so, it has never been stated or indicated in any United States Supreme Court decision as the basis

[23] *Moses-II*, 79 Wash.2d at p. 108, 483 P.2d p. 834.

[24] H.R.J. Res. 698, 87th Cong., 2d Sess. (1962); H.R.J.Res. 48, 88th Cong., 1st Sess. (1963); S.J.Res. 170 & 171, 88th Cong., 2d Sess. (1964) All have died in committee.

or source of authority for the federal judicial decisions authorizing state regulation of off reservation treaty fishing rights.

Since Congress has the power to qualify or revoke any treaty or any provision thereof,[25] unquestionable federal authority is available to provide federal regulation, or to authorize state regulation, for the protection of fishery resources against any threatened or actual harm that might arise from off reservation treaty right fishing by tribal members limited *only* by tribal regulation.[26] In these circumstances it is unfortunate, to say the least, that state police power regulation of off reservation fishing should be authorized or invoked on a legal basis never specifically stated or explained. This is particularly true because state regulation of off reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future.

Having the judicial duty to independently research, consider and fairly appraise the tribes' contention concerning state regulation of off reservation treaty right fishing, this court has intended and attempted to do that as conscientiously and thoroughly as possible within the personal capabilities of the author of this decision. The results of that effort are above stated as directly and briefly as the subject matter appeared to permit.

In the opinion of this court, judicial integrity also requires this court to hold that the tribes' contention that the state does not have legal authority to regulate the exercise of their off reservation treaty right fishing must be and hereby is denied by this court. The basis of this ruling is the indisputable and unqualified duty of every federal circuit or trial judge, despite academic or personal misgivings, to enforce and apply every principle of law as it

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[25]See footnote 22.

[26]With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

is directly stated in a decision of the United States Supreme Court. Recently the United States Supreme Court in *Puyallup-I* and *Puyallup-II* directly and specifically held that Washington has the power to regulate off reservation treaty right fishing in the particulars and to the extent indicated in those decisions, which holding continues in effect unless and until overruled or modified by that court or by Congress. Accordingly, each of the rulings on specific issues in this case stated in Section IV of this decision has been considered and determined on that basis.

IV. RULINGS ON MAJOR ISSUES IN THIS CASE

1. In the detailed Findings of Fact and Conclusions of Law on file herein this court has found and held and hereby reaffirms that each of plaintiff tribes in this case, including each of the tribes whose status as such was challenged by some or all defendants, has established its status as an Indian tribe recognized as such by the federal government and therefore is entitled to maintain this action for relief based on a treaty of the United States negotiated by and for the tribe, its members at that time and their descendants.

An appeal from a district court decision holding that the Puyallup reservation no longer exists has not yet been determined. However, in *Menominee* (1968) the United States Supreme Court held that termination of a tribal reservation established pursuant to a treaty did not extinguish hunting and fishing rights, reserved in the treaty by implication, or impair the exercise of such rights within the area of the terminated reservation. In the opinion of this court, treaty right fishing within the area of a former Indian reservation cannot be *exclusive* when that reservation no longer exists, but such fishing must be "in common with" non-treaty right fishermen. It is so found and held and hereby shall be applicable to any plaintiff tribe, the reservation of which has been or hereafter may be terminated.

2. Ever since the first Indian treaties were confirmed by the Senate, Congress has recognized that those treaties established self-government by treaty tribes, excepting only as limited in the treaties, judicial interpretation thereof or by Congress. This basic principle was confirmed in the first United States Supreme Court decision dealing with such a treaty[27] and has always been expressly or

[27] *Cherokee*, 30 U.S. p. 15 et seq. (1831)

impliedly reaffirmed when applicable in every succeeding decision of that court. There was a period during which Congress enacted legislation limiting the exercise of tribal autonomy in various particulars. However, in the last decade Congressional legislation has definitely been in the contrary direction, notably in the socalled "Indian Civil Rights Act."[28] Among other measures in that Act encouraging the exercise of tribal autonomy are those providing for enlarged jurisdiction of tribal courts, pursuant to which special training of tribal judges and other court personnel has been in progress for some time and still continues.

These measures and others make plain the intent and philosophy of Congress to increase rather than diminish or limit the exercise of tribal self-government.

The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes, with rare exceptions even among tribal members who personally do not fish or derive therefrom any substantial amount of their subsistence. The right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy and litigation involving all of the tribes and numerous of their individual members for many years past.

The philosophy of Congress referred to above and the evidence in this case as a whole clearly indicate to this court that the time has now arrived, and this case presents an appropriate opportunity, to take a step toward applying congressional philosophy to Indian treaty right fishing in a way that will not be inconsistent with *Puyallup-I* and *Puyallup-II* and also will provide ample security for the interest and purposes of conservation.

In all the circumstances shown by the evidence, including those briefly sketched above, this court hereby finds and holds that any one of plaintiff tribes is entitled to exercise its governmental powers by regulating the treaty right fishing of its members without any state regulation thereof; PROVIDED, however, the tribe has and maintains the qualifications and accepts and abides by the conditions stated below. If, as to any plaintiff tribe, any one

[28]Pub.L. #90-284 Title II-VII; 82 Stat. pp. 77-81 (1968)

of such qualifications and conditions is not determined by the court in this decision on the evidence in this case, establishment of the qualifications and conditions of each other plaintiff tribe shall be determined either to the satisfaction of both Fisheries and Game, or upon hearing by or under direction of the court. When the qualifications and conditions of a tribe have been fully established in the manner indicated, that tribe shall be relieved of state regulation except to the extent specified in the below stated conditions. Failure of a tribe either to maintain its required qualifications or to abide by and adhere to prescribed conditions, when established and not promptly corrected, shall suspend self-regulation by such tribe until such time as all required qualifications and conditions are fully established.

To qualify for self-regulation of off reservation treaty right fishing as above provided, a tribe must establish to the satisfaction of either Fisheries and Game or the court, that the tribe has each of the following qualifications and that the tribe will accept and abide by each of the following conditions.

QUALIFICATIONS

The tribe shall have:

(a) Competent and responsible leadership.

(b) Well organized tribal government reasonably competent to promulgate and apply tribal off reservation fishing regulations that, if strictly enforced, will not adversely affect conservation.

(c) Indian personnel trained for and competent to provide effective enforcement of all tribal fishing regulations.

(d) Well qualified experts in fishery science and management who are either on the tribal staff or whose services are arranged for and readily available to the tribe.

(e) An officially approved tribal membership roll.

(f) Provision for tribal membership certification, with individual identification by photograph, in a suitable form that shall be carried on the person of each tribal member when approaching, fishing in or leaving either on or off reservation waters.

CONDITIONS

The tribe shall:

(a) Provide for full and complete tribal fishing regulations which, before adoption, have been discussed in their proposed final form with Fisheries and Game, and include therein any state regulation which has been established to the satisfaction of the tribe, or upon hearing by or under direction of this court, to be reasonable and necessary for conservation.

(b) Permit monitoring of off reservation Indian fishing by Fisheries and Game to the extent reasonable and necessary for conservation.

(c) Provide fish catch reports, as to both on and off reservation treaty right fishing, when requested by Fisheries or Game for the purpose of establishing escapement goals and other reasonable and necessary conservation purposes.

All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case. Indeed, any contention to the contrary would be diametrically opposed to the Indian self-government intent and philosophy of Congress. However, state regulation of off reservation fishing to the extent reasonable and necessary for conservation requires that Fisheries and Game must have all information essential to such limited regulation. From the evidence in this case, the court hereby finds and holds that recording the number of fish taken in treaty right fishing, both on and off reservation, is essential to reliable estimates of future run sizes which are necessary for reasonably accurate calculation of spawning escapement requirements and for the allocation of harvestable fish as provided in this decision.

The lack of adequate, or any, approved identification of treaty right fishermen long has and now does seriously interfere with their fishing and hampers enforcement of both tribal and state regulations reasonable and necessary for conservation. Therefore, each of plaintiff tribes, self-regulated or not, is hereby directed to provide as promptly as practicable both (a) certification and identification of its tribal fishermen as specified in ¶ (f) of the above stated Qualifications; and also (b) fish catch returns as specified in ¶ (c) of the above stated conditions.

The uncontradicted evidence shows that for a considerable time

the Quinault and Yakima tribes have adopted and effectively enforced tribal fishing regulations which in some material respects are more restrictive than the regulations of Fisheries and Game. To a considerable extent those tribes have consulted and cooperated with Fisheries and Game in matters pertaining to responsible regulation of Indian fishing. In the Findings of Fact and Conclusions of Law on file herein the court has found, held and hereby confirms that the evidence in this case clearly establishes that both the Quinault and Yakima Tribes for a considerable time have had, and now have, each of the above stated Qualifications, other than (f), and have provided or permitted each of the above stated Conditions, other than (c). The items excepted can and the court believes will be promptly supplied by both tribes; and when accomplished, the Quinault and Yakima Tribes shall be entitled to exercise their treaty fishing rights without any state regulation thereof, except as hereinabove provided.

The evidence indicates several other plaintiff tribes have capacity for, and are not far from, achievement of the same status, which potentially is within the capability of every plaintiff tribe.

3. Although state police power permits state regulation of the exercise of off reservation treaty fishing rights, under all of the United States Supreme Court decisions cited or quoted hereinabove there can be no doubt that it is *not* within the province of state police power, however liberally defined, to deny or "qualify" rights which are made the supreme law of the land by the federal constitution. Therefore, in each specific particular in which the state undertakes to regulate the exercise of treaty right fishing, all state officers responsible therefor must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that *any* regulation will restrict the exercise of a right guaranteed by the United States Constitution. Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

To clearly identify state treaty right fishing regulations and to make them more readily understood and usable by plaintiff

tribes and others interested therein such regulations shall be published either separate and apart from other state fishing regulations or as a separate and plainly labeled part thereof readily distinguishable from other fishing regulations.

4. However broadly the word may be used and applied in the theory and practice of fisheries science and management, "conservation" as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, "reasonable" means that a specifically identified conservation measure is appropriate to its purpose; and "necessary" means that such purpose in addition to being reasonable must be essential to conservation.

5. The state having the burden of proof as above indicated, no regulation applied to off reservation treaty fishing can be valid or enforceable unless and until it has been shown reasonable and necessary to conservation as above defined. The arrest of, or seizure of property owned or in permitted custody of, a treaty right fisherman under a regulation not previously established to be reasonable and necessary for conservation, is unlawful and may be actionable as to any official or private person authorizing or committing such unlawful arrest or seizure.

6. If alternative means and methods of reasonable and necessary conservation regulation are available the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

7. In *Arizona* the United States Supreme Court held that irrigation water rights reserved by implication in an Indian treaty could only be limited in amount to the total reasonably required by the needs of the treaty tribe as determined from time to time indefinitely in the future. That holding cannot be distinguished in principle or application from the fishing rights specifically reserved by the plaintiff tribes and recognized by the United States in the treaties. Since tribal on reservation treaty right fishing is exclusive, fish taken on reservation shall not be included in any allocation of fish between treaty and non-treaty fishermen. Therefore,

the *amount* or *quantity* of any species of fish that may be taken off reservation by treaty right fishing during a particular fishing period can only be limited by either:

(a) The number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation, and

(b) The number of harvestable fish non-treaty fishermen may take at the tribes' "usual and accustomed grounds and stations" while fishing "in common with" treaty right fishermen.

As used above, "harvestable" means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations, after deducting the number of fish required for spawning escapement and tribal needs.

Arizona was concerned with the amount of water impliedly reserved for the use of the treaty tribe and it was held they were entitled to the full amount required to serve their needs. In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties. The evidence shows beyond doubt that at treaty time the opportunity to take fish for personal subsistence and religious ceremonies (FF ## 3, 6) was the single matter of utmost concern to all treaty tribes and their members. The extent of taking fish by tribal members for these purposes is now less than in former times but for a substantial number of tribal members at or near poverty level their need in these particulars is little, if any, less than it was for their ancestors. For these reasons the court finds that the taking of fish for ceremonial and subsistence purposes has a special treaty significance distinct from and superior to the taking of fish for commercial purposes and therefore fish taken to serve ceremonial and subsistence needs shall not be counted in the share of fish that treaty right fishermen have the opportunity to take. Such needs shall be limited to the number of fish actually used for: (a) Traditional tribal ceremonies; and (b) Personal subsistence consumption by tribal members and their immediate families.

By dictionary definition and as intended and used in the Indian treaties and in this decision "in common with" means *sharing*

equally the opportunity to take fish[29] at "usual and accustomed grounds and stations"; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish, as stated above.

While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience. However, it is necessary at the outset to establish the scope of the anadromous fish resource which is subject to being "shared equally." The amount of fish of a particular species, from which the harvestable portions allocable to treaty right fishermen and non-treaty right fishermen are to be determined, is not merely the number of harvestable fish of that species which pass through the usual and accustomed fishing places of the various treaty tribes.

It is uncontroverted in the evidence that substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen. [Ex. F-6, 7; PL-67(b)-(c); JX-2(a), pp. 125-135; Figs. 49-54, Tables 34-60]. These catches reduce to a significant but not specifically determinable extent the number of fish available for harvest by treaty right fishermen. A considerable amount of this harvest is beyond any jurisdiction or control of the State. Some of this harvest is subject to limited state control because the landings are made in areas of state jurisdiction. A considerable number of fish taken within the territorial waters of Washington are under the regulatory authority of the International Pacific Salmon Fisheries Commission, an international body estab-

[29]The court has found and hereby affirms that Indians fished for commercial purposes at and prior to treaty times and have the right to do so now and in the future. If and when any question is raised by any party pertaining to commercial fishing by Indians, it will be heard and determined by the court. (FF #7).

lished by treaty between the United States and Canada. While the defendants cannot determine or control the activities of that Commission, the Washington Department of Fisheries does have some input into development of the harvest program which is prescribed or permitted by that Commission, particularly as it pertains to harvest within Washington waters. The Commission is essentially concerned with assuring adequate spawning escapement from runs subject to its jurisdiction and equal division of the harvestable portion between the two countries. Its control over times, places and manner of harvest is designed to accomplish those results. [Ex. JX-2a, § 2.14, pp. 013-104; and the Commission's annual report for 1971.] Consequently, while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes had access at their usual and accustomed fishing places at treaty times. Some additional adjustments in the harvesting scheme under state jurisdiction may be necessary to approach more nearly an equal allocation of the opportunity to harvest fish at usual and accustomed grounds and stations.

Therefore, this court finds and holds that the amount of fish of each species from which the harvestable portions shall be determined for the purposes of allocation consistent with this opinion shall be:

1. The total number of fish within the regulatory jurisdiction of the State of Washington which, absent harvest en route, would be available for harvest at the treaty tribes' usual and accustomed fishing places; plus

2. An additional equitable adjustment, determined from time to time as circumstances may require, to compensate treaty tribes for the substantially disproportionate numbers of fish, many of which might otherwise be available to treaty right fishermen for harvest, caught by non-treaty fishermen in marine areas closely adjacent to but beyond the territorial waters of the State, or outside the jurisdiction of the State, although within Washington waters.

It is suggested in *Puyallup-II* that a distinction between native and propagated steelhead should be made in computing

the allocation of fish to off reservation treaty right and to non-treaty right fishing. This appears to present many difficulties and problems which must be considered and determined with all deliberate speed, by agreement or by judicial decision. Discharge of that responsibility appears to be within the jurisdiction of this court by issues all parties have submitted to this court in the Final Pretrial Order in this case. However, under the *Puyallup-II* mandate to the State Supreme Court it appears appropriate to this court that the state courts hear and determine the matter referred to, at least in the first instance.

8. Certain issues in this case are specified in the Final Pretrial Order which involve reef net fisheries. The only parties in this case directly concerned with these issues are the defendant Reef Net Owners and the plaintiff Lummi Tribe, although it may be other parties and non-parties have the same or similar interests. In the Findings of Fact and Conclusions of Law filed herein, the court has found and held: (a) that there is evidence which the court finds reasonable, credible and sufficient to establish that plaintiff Lummi Tribe has treaty fishing rights in the reef net fishing areas involved; (b) that members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish with reef nets in such areas; (c) that while non-treaty fishermen when licensed by the State to fish in reef net areas have the *privilege* of fishing in those areas "in common with" Lummi Tribal members, they do not have the *right* to do so.

The specific number and location of stations in the reef net areas at which Lummi Tribal members shall have the right and opportunity to fish and what, if any, conditions shall be applicable thereto, will be determined by or under direction of this court upon hearing of those matters at the earliest date reasonably convenient to counsel and the court.

9. *Sohappy* is a 1969 decision by Judge Robert Belloni of the Oregon United States District Court on Indian treaty fishing rights involving a number of law and fact issues identical or closely similar to those presented in this case. Much of what was found and held in that thoroughly researched, well reasoned and highly practicable decision is directly applicable to issues to be determined in the present case. The *Sohappy* decision was not appealed and therefore it is controlling as to all parties to that case which include the United States and the Yakima Tribe. The following quotations from

that decision, changed by this court only as bracketed, are hereby adopted and held by this court to be applicable to the issues in the present case.

302 F.Supp. at page 907:

". . . [B]efore [Washington] may regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

'(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

'(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

'(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, . . . fish [to the extent hereinabove specified.]

* * * * * *

At pages 908-909:

". . . state restriction on treaty referenced fishing must be 'necessary for the conservation of the fish.' . . . It [the Supreme Court] was not endorsing any particular state management program which is based not only upon that factor but also upon allocation of fish among particular user groups or harvest areas, or classification of fish to particular uses or modes of taking.

The state may regulate fishing by non-Indians to achieve a wide variety of management or 'conservation' objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use

its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this 'federal right' is, therefore, 'distinct from the federal constitutional standard concerning the scope of the police power of the State.' [citations] To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish."

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At page 911:

"The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. Puyallup Tribe et al. v. Department of Game, et al., supra. [citations] I interpret this to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."

At page 911:

"There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago."

* * * * * *

At pages 911-912:

"In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy [at least] co-equal with the conservation of fish runs for other users. The restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has [shown] to be necessary for conservation. [citations]

This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, 'proper anadromous fishery management in a changing environment is not susceptible of rigid predetermina-

tion. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination.' The requirements of fishery regulation are such that many of the specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.

I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process. [and to seek prompt judicial review of regulations assertedly invalid.]

This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights."

* * * * * *

At page 912:

". . . the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding upon the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior. But certainly agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing rights are means which the state [should] adopt in the exercise of its jurisdiction over such fishing rights. Both the state and the tribes should be encouraged [and directed] to pursue such a cooperative approach . . ."

Thus far, this decision has been confined to discussion and ruling upon major issues, mostly because of the great number of secondary, or comparatively less important, issues of fact and law presented in this case. However, fact findings and legal conclusions, with comment thereon in most instances, on all of the secondary findings are

included in the Findings of Fact and Conclusions of Law filed herein. For the most part the secondary findings and conclusions provide amplifying and implementing details for both major and secondary rulings of the court. Every issue, proposed finding of fact and conclusion of law, of whatever importance, has been individually considered and determined in the Findings of Fact and Conclusions of Law on file in this case, excepting only with a few reservations that are stated and explained in each instance.

Subject to suggested limitations by some of the parties, all parties have urged that the court reserve continuing jurisdiction of this case and have suggested various ways in which such jurisdiction might be exercised. Quotations from *Sohappy,* above quoted and adopted by this court, indicate some of the purposes for, and practical importance of, continuing jurisdiction in this type of case. From the beginining most, if not all, counsel in this case and the court have anticipated that continuing jurisdiction would be of great value to all parties in promptly putting the court's rulings into effect and in providing readily available early hearing and determination of factual and legal questions that may arise in interpreting and applying such rulings. Accordingly, the court does hereby reserve continuing jurisdiction of this case without limitation at this time.

Most if not all parties have also suggested that the court should appoint a master with technical fisheries expertise to assist the court in helping the parties to reach agreed solutions of problems and questions when agreement thereon cannot be reached. Questions regarding whether or not a master should be appointed, the suggested and perhaps other purposes for appointment of a master, with or without technical fisheries expertise; and, if appointed what the master's duties should be and the manner of his selection, will be considered and determined at a hearing on the earliest date after the entry of the judgment and decree reasonably convenient to all counsel. At that hearing counsel are requested to present their views as to whether or not the court should appoint an Advisory Committee on Treaty Right Fishing. The members of such a committee should be knowledgeable and responsible citizens inclined to and capable of objectively considering, determining and reporting to the court the viewpoint of the interested public concerning Indian fishing as to: satisfactory solution of problems; means of expediting better communication between Indian and non-Indian officials and fishermen

and keeping interested citizens in this area more accurately informed on matters pertaining to Indian fishing. Other topics to be considered at the conference may be suggested by counsel.

The remaining issues in this case reserved for separate pretrial and trial in the future, however such issues may be determined, do not have direct or indirect bearing upon any issue submitted and heretofore tried by this court. Accordingly, this decision and the Declaratory Judgment and Decree based thereon, upon entry in this case, shall become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201; subject only to determination of any motions that may be appropriately and timely served and filed following entry of the Final Judgment and Decree. Each such motion, if any, that may be filed shall be supported[30] by a memorandum of authorities to which

[30]Local Rules WD Wash. Civil Rule 7.

counsel for adverse parties shall timely serve and file a responsive memorandum of authorities, following which such motions, if any, shall be promptly heard and determined by the court on the earliest date reasonably convenient to counsel and the court.

The findings of fact, conclusions of law, decrees and rulings by the District Court are very long and therefore in accordance with a conversation with the Clerk's office are not set forth in this Appendix. That material is reported in 384 F. Supp. 312, commencing at 348.

TREATY OF MEDICINE CREEK

December 26, 1854
10 Stat. 1132

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

TREATY OF POINT ELLIOTT

January 22, 1855
12 Stat. 927

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE MAKAH (TREATY OF NEAH BAY)

January 31, 1855
12 Stat. 939

ARTICLE IV. The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and

unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

TREATY WITH THE QUINAIELTS

July 1, 1855
12 Stat. 971

ARTICLE III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and shall keep up and confine the stallions themselves.

TREATY WITH THE YAKIMAS

June 9, 1855
12 Stat. 951

ARTICLE III. *And provided,* That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

1937 CONVENTION BETWEEN UNITED STATES AND CANADA—ratified by Congress and Proclaimed August 4, 1937 (50 Stat. 1355 as supplemented by 8 T.I.A.S. 3867, 8 U.S.T. 1057)

* * *

The President of the United States of America and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, recognizing that the protection, preservation and extension of the sockeye salmon fisheries in the Fraser River system are of common concern to the United States of America and the Dominion of Canada; that the supply of this fish in recent years has been greatly depleted and that it is of importance in the mutual interest of both countries that this source of wealth should be restored and maintained, have resolved to conclude a Convention and to that end have named as their respective plenipotentiaries:

* * *

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

* * *

ARTICLE II

The High Contracting Parties agree to establish and maintain a Commission to be known as the International Pacific Salmon Fisheries Commission, hereinafter called the Commission, consisting of six members, three on the part of the United States of America and three on the part of the Dominion of Canada.

The Commissioners on the part of the United States of America shall be appointed by the President of the United States of America. The Commissioners on the part of the Dominion of Canada shall be appointed by His Majesty on the recommendation of the Governor General in Council.

* * *

ARTICLE III

The Commission shall make a thorough investigation into the natural history of the Fraser River sockeye salmon, into hatchery methods, spawning ground conditions and other related matters. It shall conduct the sockeye salmon fish cultural operations in the waters described in paragraphs numbered 2 and 3 and Article I of

this Convention, and to that end it shall have power to improve spawning grounds, construct, and maintain hatcheries, rearing ponds and other such facilities as it may determine to be necessary for the propagation of sockeye salmon in any of the waters covered by this Convention, and to stock any such waters with sockeye salmon by such methods as it may determine to be most advisable. * * *

ARTICLE IV

The Commission is hereby empowered to limit or prohibit taking sockeye salmon in respect of all or any of the waters described in Article I of this Convention, provided * * *[1] that no order limiting or prohibiting taking sockeye salmon adopted by the Commission shall be construed to suspend or otherwise affect the requirements of the laws of the State of Washington or of the Dominion of Canada as to the procuring of a license to fish in the waters on their respective sides of the boundary, or in their respective territorial waters embraced in paragraph numbered 1 of Article I of this Convention, and provided further that any order adopted by the Commission limiting or prohibiting taking sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

ARTICLE V

In order to secure a proper escapement of sockeye salmon during the spring or chinook salmon fishing season, the Commission may prescribe the size of the meshes in all fishing gear and appliances that may be operated during said season in the waters of the United States of America and/or the Canadian waters described in Article I of this Convention. At all seasons of the year the Commission may prescribe the size of the meshes in all salmon fishing gear and appliances that may be operated on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, provided, however, that in so far as concerns the High Seas, requirements prescribed by the Commission under the authority of this paragraph shall apply only to nationals and inhabitants and vessels and boats of the United States of America and the Dominion of Canada.

---

[1]The material we have shown as deleted was removed by Article II, 8 U.S.T. 1057.

Whenever, at any other time than the spring or chinook salmon fishing season, the taking of sockeye salmon in waters of the United States of America or in Canadian waters is not prohibited under an order adopted by the Commission, any fishing gear or appliance authorized by the State of Washington may be used in waters of the United States of America by any person thereunto authorized by the State of Washington, and any fishing gear or appliance authorized by the laws of the Dominion of Canada may be used in Canadian waters by any person thereunto duly authorized. Whenever the taking of sockeye salmon on the High Seas embraced in paragraph numbered 1 of Article I of this Convention is not prohibited, under an order adopted by the Commission, to the nationals or inhabitants or vessels or boats of the United States of America or the Dominion of Canada, only such salmon fishing gear and appliances as may have been approved by the Commission may be used on such High Seas by said nationals, inhabitants, vessels or boats.

ARTICLE VI

No action taken by the Commission under the authority of this Convention shall be effective unless it is affirmatively voted for by at least two of the Commissioners of each High Contracting Party.

All regulations made by the Commission shall be subject to approval of the two Governments with the exception of orders for the adjustment of closing or opening of fishing periods and areas in any fishing season and of emergency orders required to carry out the provisions of the Convention.[2]

ARTICLE VII

The Commission shall regulate the fisheries for sockeye and for pink salmon with a view to allowing, as nearly as practicable, an equal portion of such sockeye salmon as may be caught each year and an equal portion of such pink salmon as may be caught each year to be taken by the fishermen of each Party.[3]

ARTICLE VIII

Each High Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the Commission under

[2]The second paragraph of Article VI, was added by Article III, 8 U.S.T. 1057.

[3]The original Article VII was replaced with this language by Article IV, 8 U.S.T. 1057.

the authority of this Convention, in the portion of its waters covered by the Convention.

Except as hereinafter provided in Article IX of this Convention, each High Contracting Party shall be responsible, in respect of its own nationals and inhabitants and vessels and boats, for the enforcement of the orders and regulations adopted by the Commission, under the authority of this Convention, on the High Seas embraced in paragraph numbered 1 of Article I of the Convention.

* * *

ARTICLE IX

Every national or inhabitant, vessel or boat of the United States of America or of the Dominion of Canada, that engages in sockeye salmon fishing on the High Seas embraced in paragraph numbered 1 of Article I of this Convention, in violation of an order or regulation adopted by the Commission, under the authority of this Convention, may be seized and detained by the duly authorized officers of either High Contracting Party, and when so seized and detained shall be delivered by the said officers, as soon as practicable, to an authorized official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be agreed upon with the competent authorities. * * *

ARTICLE X

The High Contracting Parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention and the orders and regulations adopted by the Commission under the authority thereof, with appropriate penalties for violations.

* * *

16 USC

§ 776a. Unlawful acts

(a) It shall be unlawful for any person to engage in fishing for sockeye salmon or pink salmon in convention waters in violation of the convention or of this chapter or of any regulation of the Commission.

* * *

(g) It shall be unlawful for any person or vessel to do any act prohibited or to fail to do any act required by the convention or by this chapter or by any regulation of the Commission.

July 29, 1947, c. 345, § 3, 61 Stat. 511; July 11, 1957, Pub.L. 85-102, § 3, 71 Stat. 294.

16 USC

§ 776d. Enforcement—Designation of Federal agency; cooperation with State and Dominion officers

(a) The President of the United States shall designate a Federal agency which shall be responsible for the enforcement of the provisions of the convention and this chapter and the regulations of the Commission, except to the extent otherwise provided for in the convention and this chapter. It shall be the duty of the Federal agency so designated to take appropriate measures for enforcement at such times and to such extent as it may deem necessary to insure effective enforcement and for this purpose to cooperate with other Federal agencies, State officers, the Commission, and with the authorized officers of the Dominion of Canada.

Authorization to State officers

(b) The Federal agency designated by the President for enforcement purposes may authorize officers and employees of the State of Washington to enforce the provisions of the convention and of this chapter and the regulations of the Commission. When so authorized such officers may function as Federal law-enforcement officers for the purposes of this chapter.

Conformity to convention article

(c) Enforcement of the convention and this chapter and the regulations of the Commission shall be subject to and in accordance with the provisions of article IX of the convention.

Arrests, searches, and seizures

(d) * * * any officer or employee of the State of Washington who is authorized by the Federal agency so designated by the President; * * * shall have power, without warrant or other process, but subject to the provisions of the convention, to arrest any person committing in his presence or view a violation of the convention or of this chapter or of the regulations of the Commission and to take such person immediately for examination before an officer or trial before a court of competent jurisdiction; and shall have power, without warrant or other process, to search any vessel within convention waters when he has reasonable cause to believe that such vessel is subject to seizure under the provisions of the convention or this chapter, or the regulations of the Commission, and to search any place of business or any commercial vehicle when he has reasonable cause to believe that such place or vehicle contains fish taken, possessed, transported, purchased, or sold in violation of any of the provisions of the convention, this chapter, or the regulations of the Commission. Any person authorized to enforce the provisions of the convention and of this chapter and the regulations of the Commission shall have power to execute any warrant or process issued by an officer or court of competent jurisdiction for the enforcement of this chapter, and shall have power with a search warrant to search any person, vessel, or place, at any time. * * * Subject to the provisions of the convention, any person authorized to enforce the convention and this chapter and the regulations of the Commission may seize, whenever and wherever lawfully found, all fish caught, shipped, transported, purchased, sold, offered for sale, imported, exported, or possessed contrary to the provisions of the convention or this chapter or the regulations of the Commission and may seize any vessel, together with its tackle, apparel, furniture, appurtenances and cargo, and all fishing gear, used or employed contrary to the provisions of the convention or this chapter or the regulations of the Commission, or which it reasonably appears has been used or employed contrary to the provisions of the convention or this chapter or the regulations of the Commission.

* * *

RCW 75.40.060 The director and his duly authorized agents are hereby authorized to adopt and to enforce the provisions of the convention between the United States and the Dominion of Canada for the protection, preservation and extension of the sockeye salmon fishery of the Fraser River system, signed at Washington, District of Columbia, on the twenty-sixth day of May, 1930, and the regulations of the commission promulgated under authority of said convention.

The District Court held that the following state statutes cannot lawfully be applied to restrict members of tribes having treaty fishing rights from exercising those rights. (Title 75 RCW relates to salmon and Title 77 RCW relates to game and steelhead.) (Conclusion of Law 41, 384 F. Supp. 312, ...) p.

RCW 75.08.260 Unless otherwise provided for in the fisheries code any person who violates any of the provisions of the fisheries code, or any of the rules or regulations of the director made pursuant thereto, or who aids or abets or assists in the violation thereof, shall be guilty of a gross misdemeanor, and upon a conviction thereof shall be punished by imprisonment in the county jail of the county in which the offense is committed for not less than thirty days or more than one year, or by a fine of not less than twenty-five dollars or more than one thousand dollars, or by both such fine and imprisonment.

RCW 75.12.060 It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampara net, fish trap, fish wheel, scow fish wheel, set net, weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means.

RCW 75.12.070 Unless otherwise provided for in the regulations of the director, it shall be unlawful to shoot, gaff, snag, snare, spear, stone, or otherwise molest any food fish or shellfish in any of the waters of the state.

RCW 75.12.160 It shall be unlawful to fish for salmon for commercial purpose with reef net fishing gear in any waters of the state of Washington except in those waters within the reef net areas described in this chapter.

RCW 77.08.020 [This statute defines game fish and includes within the definition steelhead.]

RCW 77.12.100 Any member of the commission, the director, and all game protectors, deputy game protectors, and ex officio game protectors, may seize without warrant all wild birds, wild animals, game fish, or parts thereof, taken, killed, transported, or possessed contrary to law, or rule or regulation of the commission, and any dog, gun, trap, net, seine, decoy, bait, boat, light, fishing tackle, or other device unlawfully used in hunting, fishing, or trapping, or held with intent to use unlawfully in hunting, fishing, or trapping. The justice of the peace in either of the two nearest incorporated cities or towns nearest the place the seizure is made shall have power and jurisdiction in any prosecution for unlawfully hunting, fishing, or trapping, in addition to any other penalty provided by law, to forfeit for the use of the commission, any wild animal, wild bird, or game fish, and any article or dog so seized and proved to have been unlawfully used or held with intent unlawfully to use. In case it appears upon the sworn complaint of the officer making the seizure that any articles seized were not in the possession of any person, and that the owner thereof is unknown, the court shall have power and jurisdiction to forfeit such articles so seized upon a hearing duly had after service of summons, describing the articles seized, upon the unknown owner by publication in the manner provided by law for the service of summons by publication in civil actions. All dogs, guns, traps, nets, seines, decoys, baits, boats, lights, fishing tackle, or other devices seized under the provisions of this title unless forfeited by order of the court, shall be returned, after the completion of the case, and the fines, if any, have been paid.

RCW 77.12.130 All nets, seines, lanterns, snares, devices, contrivances, and materials while in use, or had and maintained, for the purpose of catching, taking, or killing, or attracting, or decoying any wild bird, wild animal, or game fish, contrary to law or rule or regulation of the commission, are public nuisances. The director and all game protectors, deputy game protectors, ex officio game protectors, and all police officers, shall without warrant or process, take, seize, abate, or destroy them while being used, had, or maintained for such purpose.

RCW 77.16.020 It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals

or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, fur-bearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain sheep, caribou or deer in violation this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeaner and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

RCW 77.16.030 It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or part thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten

days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish, or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish who, has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal, or fish, when properly tagged or sealed.

RCW 77.16.040 Except as authorized by permit or license lawfully issued by the director, or by rule or regulation of the commission, it shall be unlawful for any person to have in his possession for sale or with intent to sell, or to expose or offer for sale or to sell or to barter for, or to exchange, or to buy, or to have in his possession with intent to ship, or to ship, any game animal, game bird, game fish, or endangered species of fish or wildlife or any part thereof or any article made in whole or part from the skin, hide, or other parts of any endangered species of fish or wildlife. It shall further be unlawful for any common or contract carrier knowingly to transport or receive for shipment any such game animal, game bird, or fish, or endangered species of fish or wildlife or any part thereof or any article made in whole or part from the skin, hide, or other parts of any endangered species of fish or wildlife: *Provided,* That nothing contained in this section shall prohibit any person from buying, selling, or shipping any lawfully tagged or sealed game animal, game bird, or game fish purchased from a licensed game farmer.

Any person violating this section shall be guilty of a gross misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

RCW 77.16.060 It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up,

snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.

Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

I hereby certify that on this 17th day of October, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage paid, to Robert H. Bork, Solicitor General, Justice Building, Constitution Avenue between 9th & 10th St., NW, Washington, D.C. 20530, counsel for respondents. I further certify that all parties required to be served have been served.

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SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-588, 75-592

STATE OF WASHINGTON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

and

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, *Petitioner*,

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

BRIEF OF RESPONDENT INDIAN TRIBES IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Signatures on Page 2 of Cover)

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STATE OF WASHINGTON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

and

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, *Petitioner,*

v.

UNITED STATES OF AMERICA, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, QUILEUTE INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN INDIAN NATION, UPPER SKAGIT RIVER TRIBE, NISQUALLY INDIAN COMMUNITY OF THE NISQUALLY RESERVATION, AND PUYALLUP TRIBE OF THE PUYALLUP RESERVATION, *Respondents*

BRIEF OF RESPONDENT INDIAN TRIBES IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The district court's opinion appears at 384 F.Supp. 312.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

On the Petitions for Certiorari:

1. Does the decision of the court of appeals conflict with *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968) by limiting the exercise of state police power over federally secured Indian treaty rights to situations where it can be demonstated that state regulation is necessary for conservation, *i.e.,* to preserve or maintain the fishery resource?

2. Did the court of appeals properly sustain a limited right of tribal self regulation of treaty fishing?

3. Did the court of appeals err in upholding the district court's equitable discretion to fashion remedies assuring fair apportionment of fishing opportunity?

4. Is there a conflict between the 1937 Convention with Canada and the Indian treaties?

On Respondents' Conditional Cross Petition:

5. Has the United States authorized the State of Washington to use its police power to regulate or curtail the exercise of federally secured Indian treaty fishing rights?

TREATIES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Six treaties between the respondent United States and the respondent Indian tribes each secure continuing off reservation fishing rights to the tribes in almost identical language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory . . . .

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 28, 1855, 12 Stat. 933; Treaty with the Makah, January 31, 1855, 12 Stat. 939; Treaty with the Yakima, June 9, 1855, 12 Stat. 951; Treaty with the Quinaeilt, July 1, 1855, 12 Stat. 971.

Respondents, plaintiffs below, predicated their basic claims upon the supremacy clause Article VI, United States Constitution which requires that:

> all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The State of Washington petitioners have contended that the 1937 Convention with Canada (50 Stat. 1355), a 1957 protocol amending it (T.I.A.S. 3867, 8 U.S.T. 1057), and federal statutes pertaining to it are involved. The provisions deemed to be pertinent are reprinted in their Petition/Appendix at pp. 95-100.

STATEMENT OF THE CASE

Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, claiming that state regulatory provisions and practices impinged upon the rights of Indians to fish in Western Washington waterways as guaranteed in six treaties between the tribes and the United States. Jurisdiction was invoked under 28 U.S.C. § 1345. Shortly afterwards a number of Indian tribes party to the treaties intervened as plaintiffs. The district court assumed jurisdiction over their claims pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4) and 1362. The Departments of Fisheries and Game and their respective directors were permitted to intervene as defendants in order to assert their divergent positions on the issues raised. The Washington Reef Net Owners Association also was permitted to intervene.

The plaintiffs sought declaratory relief concerning the extent of treaty secured Indian fishing rights, whether the state had interfered with their exercise, and the degree to which the state lawfully could, if at all, limit or regulate the exercise of such rights. They sought injunctive relief to provide protection and enforcement of those rights. The tribal plaintiffs contended that the state had no authority to regulate their treaty right or otherwise to deprive them of sufficient fish to meet their needs. Defendants' positions ranged from the Department of Game's denial of virtually all Indian treaty rights to the Department of Fisheries' request for a percentage quantification of the Indians' right under continuing total state regulation.

Through extensive pretrial activity and a lengthy trial a record was amassed including reports of experts in fisheries, biology and anthropology, hundreds of exhibits, and testimony of more than fifty witnesses. The district court issued its decision on February 12, 1974 along with some 253 Findings of Fact, and 48 Conclusions of Law.

The district court decision acknowledged the special nature of the Indians' treaty fishing right. It found unlawful as applied several state laws, regulations, and practices as inconsistent with rights under federal treaties and it recognized the tribes' limited right to regulate their members' treaty-secured off-reservation fishing rights. The court also adopted a formula to be used in the future in order to approach more nearly an equal sharing of the fishery resource between Indians and non-Indians, consistent with the purpose of the treaties.

The defendants appealed to the Ninth Circuit Court of Appeals from nearly every aspect of the lower court decision. The Indian tribes also appealed, questioning the decision insofar as it authorizes the state to regulate the exercise of treaty secured fishing rights. On June 4, 1975 the United States Court of Appeals for the Ninth Circuit affirmed the district court decision; subsequently it denied petitioners' request for rehearing.

Summary of Facts

Before American settlement of the Washington Territory, Indians were widely dispersed in communities throughout the area.

> The Indians west of the Cascade Mountains were known as "fish-eaters"; their diets, social cus-

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> toms, and religious practices centered on the capture of fish. Their fish-oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons.

520 F.2d 676, 682.

In 1855 the United States sought the Indians' acquiesence in treaties. This was necessary to facilitate occupation and development of the territory by an increasing number of settlers without the inevitable bloodshed and delay of armed conflict and conquest. Within seven months the six treaties involved in this case were negotiated. They provided for extinguishment of Indian claims to most of the vast land area which is now the State of Washington, leaving the Indians a few parcels of land for residence purposes. In return, the Indians received promises of small sums of money and certain goods and services. But the matter of greatest importance to the Indians was the assurance that they would be able to continue fishing as they had in the past, notwithstanding the fact that they might be required to live on reservations.

The treaties were in English, a language which few, if any, Indians present at the negotiations either spoke or read. Although negotiations were in the Chinook jargon, a trade medium of some 300 words which was understood by some Indians, the district court found the jargon inadequate to express precisely the legal effects of the treaty.

The Indian negotiators neither intended nor understood the treaty to limit their right to fish in any way. To provide for their future survival, they insisted upon retaining fishing rights throughout the areas they had

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used in the past. They were given the unqualified assurance of the United States negotiators that they would be able to do so. They consented only to share their "usual and accustomed" fishing places with the non-Indian citizens.

At the time of the treaties Indians were trading fish in substantial volume. The treaty negotiators for the government were aware of Indian commerce in fish and understood the contribution of Indian fishermen to the territorial economy, as Indians supplied most of the fish used by non-Indians.

Anadromous fish must return from the sea to their fresh-water streams of origin to spawn in sufficient numbers to assure that there will be future generations. This concept, known as "escapement", dictates that a portion of each run of fish must escape harvest.

Early in the twentieth century, development of a non-Indian commercial fishing industry and rapid population growth began to threaten continued existence of the fish runs and diminish fishing opportunities of both Indian and non-Indian fishermen. Consequently, the State of Washington undertook to regulate the taking of fish to prevent the resource from being destroyed. The prospect of non-Indian regulation had not been suggested to or anticipated by the Indian parties to the treaties.

For many years after the treaties Indians continued to fish as in the past. They successfully assured perpetuation of the fishery resource by enforcement of tribal customs and practices. As conditions changed, however, they recognized the desirability from the standpoint of conservation of having formal regulations of their members' fishing. By setting seasons, closed periods,

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gear restrictions, and limiting the number of fishermen, tribes acted to assure that sufficient fish would escape for spawning purposes. Some hired fishery biologists; many utilized expert biological advice from the U.S. Fish and Wildlife Service, an agency of the Department of the Interior. Several tribes, independently or with the United States, initiated fish propagation programs. Indian fishing practices were responsible and effective. Indeed, the district court expressed surprise that in spite of broad allegations and lengthy, vigorous litigation, the state could only produce one uncorroborated instance of Indian off reservation fishing rights being exercised in a manner detrimental to the perpetuation of fish.

The State of Washington was not content to allow Indian tribes to regulate their own treaty fisheries, at least outside the reservations. The state assumed that Indians were subject to its regulatory schemes and utilized state laws and enforcement mechanisms to restrict and prohibit treaty right fishing. The agencies charged by state law with regulation of fishing had goals other than merely assuring survival of the species. As demands upon the harvestable fish—those in excess of spawning escapement needs—escalated tremendously, the Departments of Fisheries and Game allocated fish among commercial and sports users, guided by public policies developed by the state legislature and Game Commission. This system, which failed to consider Indian needs in regulating the state's fish harvests, resulted in a decreasingly significant number of fish being available to Indians. By the time this case was brought, the Indians' treaty off reservation fishery was taking only 5% of the total harvest.

Non-treaty commercial fishing generally occurs before anadromous fish enter the waterways where most Indian usual and accustomed fishing places are located. Washington's management program deprived Indians of the opportunity to share in those fisheries by allocating most or all of the harvestable fish to others before they reached the Indians' fishing places. Any attempts by Indians to harvest the remaining fish typically have been curtailed by imposition of state laws to protect escapement.

A long, acrimonious, and occasionally violent dispute between the tribes and the state has grown out of its fishing management under laws and regulations oriented toward policy goals inconsistent with the exercise of Indian treaty rights. Predictably, the clash triggered considerable judicial activity. *E.g., Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973); *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968); *Tulee* v. *Washington,* 315 U.S. 681 (1942); *United States* v. *Winans,* 198 U.S. 370 (1905). *See also Antoine* v. *Washington,* 420 U.S. 194 (1975).

Each decision of this Court, of the Ninth Circuit Court of Appeals, and of most state appellate courts, has provided general principles for the guidance of the state in its regulation and management vis à vis Indian treaty fishermen; each has recognized that Indians are not subject to state fishing regulations as a matter of course. But judicially announced principles have been interpreted restrictively by the state and applied reluctantly only in factual contexts identical to the cases in which they arose.

More often than not, Indians have had to risk pain of criminal prosecution to test their treaty rights in court by way of defense. Isolated issues were decided piece-

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meal. It was not until this case that a court was asked to deal comprehensively with the panoply of concrete problems of an entire region created by the state management and regulatory system, in light of the meaning and intent of the treaties.

Remedies of the District Court

The district court found that state regulations as framed and enforced preferred non-Indian fishermen over Indians. In many instances the state allowed all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reached the plaintiff tribes' usual and accustomed fishing places where treaty rights apply. And the state had closed a substantial number of Indian usual and accustomed fishing areas to Indian net fishing by others while permitting net fishing elsewhere on the same runs of salmon.

The court concluded that state enforcement of fishing laws and regulations against Indians exercising treaty fishing rights at their usual and accustomed fishing places has prevented full exercise of those rights. Enforcement of state law has caused loss of income to the Indians, inhibition of their cultural practices, unlawful confiscations, damage to fishing equipment, arrests and criminal prosecutions. Several corollary matters not relevant here were also determined.

Relief was fashioned based on an extensive exploration of the intent and understanding of the treaties. Policies, practices and laws responsible for many state abuses in derogation of the Indians' treaty rights were declared to be unlawful. Limits of state power over Indian treaty fishermen were defined: the state may

restrict Indian fishing only when it is demonstrated to be necessary to preserve or maintain the resource.

State regulations bring with them a threat of criminal sanctions which has a chilling effect on the exercise of treaty rights. In view of Washington's past practices the district court required regulations (except emergency measures) to be shown to the tribes or the court to be bona fide conservation measures before the state enforces them against treaty fishermen.

The district court recognized the tribes' ability to regulate their members' off reservation treaty fishing upon meeting several stringent conditions and qualifications, but subject to state control whenever a conservation need is shown. A principle of equal sharing of the opportunity to harvest fish destined for Indian usual and accustomed fishing places between Indian and non-Indian fishermen was effectuated through the use of a formula which considers the peculiar aspects of the fisheries as well as the meaning of the treaties. *United States* v. *Washington,* 343 F.Supp. 312 (W.D. Wash. 1974). The court of appeals affirmed the district court on virtually all points *United States* v. *Washington,* 520 F.2d 696 (9th Cir. 1975).

SUMMARY OF ARGUMENT

The treaty fishing right has never been abrogated by act of Congress, subsequent treaty or otherwise. Nor has Congress extended jurisdiction over treaty fishing to the state. But under Supreme Court decisions the state may lawfully impose its regulations on treaty fishermen when it is necessary to do so for conservation. Before a particular measure can be enforced against treaty fishermen by the state it must be shown to be one which is necessary to preserve and maintain the fish,

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not simply to carry out state management policies. If the state and a tribe cannot agree that a measure is properly for conservation, the continuing jurisdiction of the court may be utilized to obtain a determination. In the first instance, however, regulation of treaty right fishing should be the responsibility of the tribes acting through their own tribal courts and law enforcement personnel.

Allocation of the opportunity to fish between treaty and non-treaty fishermen should be on a principle of equal sharing. The bargaining positions and understanding of the parties at the time of the treaties dictate that the Indians' share must not be eroded to insignificance by application of state policies designed to further the interests of non-Indians. The formula for guiding the state in allocating fishing opporunity was a reasonable one, adapting the realities of the fisheries to the rights of the parties. To the extent the formula may prove unworkable or unjust, relief can be sought from the district court.

All conservation needs are carefully protected by the decision below and the state is not hindered in its ability to preserve and maintain the fisheries. Respondents find the district court decision as affirmed by the court of appeals to be an acceptable and practical accommodation of rights under the treaties. It comports with decisions of this Court and there is no reason for this Court to grant certiorari. If, however, the decision below is to be subjected to Supreme Court review, so should the overall question of whether the state has any power over Indian treaty fishing.

ARGUMENT

I. The Decision Of The Court Below, Requiring A Showing Of Conservation Necessity Before The State May Regulate Indian Treaty Fishing, Is Consistent With *Puyallup Tribe v. Department of Game.*[1]

In *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968) (*Puyallup I*), this Court upheld a state supreme court decision that the exercise of Indians' treaty protected fishing rights could not be restrained by Washington's prohibition of all net fishing unless the law "has been established to be reasonable and necessary for the conservation of the fishery." *Department of Game* v. *Puyallup Tribe,* 70 Wash.2d 245, 422 P.2d 754 (1967).

The Court set forth standards in *Puyallup I* to guide the state in making the conservation determination on remand. The decision stated that "the 'right' to fish outside the reservation was a treaty 'right' that could not be qualified or conditioned by the State." 391 U.S. at 399. But it also said the state has a limited kind of police power, enabling it to regulate treaty fishing when it is "necessary for the conservation of fish", citing dicta in *Tulee* v. *Washington,* 315 U.S. 681 (1942). The Court cautioned that stricter scrutiny is required of measures for regulating treaty Indians than for regulating non-Indians because "[t]he measure of legal propriety of those

[1] The tribal respondents have challenged the correctness of *Puyallup I* in the district court and on appeal. In this section they demonstrate that the courts below adhered to that decision. By a conditional cross petition, to be granted only if the Court grants certiorari in Nos. 75-588 and 75-592, respondent tribes ask that this Court determine whether the state may regulate Indian treaty fishing at all. See Argument V.

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kinds of conservation measures is therefore distinct from the federal constitutional standard concerning the scope of the police power of a State." 391 U.S. at 401 n. 14. The Court also said state regulations of treaty fishing must meet "appropriate standards" and "not discriminate against the Indians."

After remand, the Department of Fisheries changed its regulations to permit certain limited Indian net fishing, but the Department of Game continued its total ban on taking steelhead by net. The state supreme court ruled that the ban on nets by Game was a proper conservation measure because there were only enough fish in the Puyallup River for sport fishermen and escapement, thus any Indian fishing would be contrary to conservation. *Department of Game* v. *Puyallup Tribe,* 80 Wash.2d 561, 573, 497 P.2d 171, 178-79 (1972). However, this Court rejected Game's management scheme as discriminatory even though it was carried out in the name of "conservation", because it preferred the interests of sport fishermen over treaty right fishermen. *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44 (1973) (*Puyallup II*). The Court made it clear that state policies and goals, beyond preservation of the species, cannot be cloaked in a mantle of "conservation" to curtail Indian treaty fishing.

> Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon . . . .

414 U.S. at 49.

In this case the court of appeals upheld the district court's definition of "conservation" as the perpetuation of a run or species of fish. 520 F.2d at 683. "The necessity to limit the catch to preserve a run defines the extent to which the state may exercise police power to regulate Indian fishing." 520 F.2d at 687. This is the teaching of *Puyallup II*.

State fish managers often include broader objectives than perpetuation of the fishery (*e.g.*, "providing for an orderly fishery" and "assuring the maximum sustained harvest") in their definition of conservation. But "the only rationale for permitting state interference with Indian fishing precludes adoption" of a definition which forces "treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens." 520 F.2d at 686.

Following *Puyallup II*, the court also validated state regulation as a vehicle for the "protection of the interests of all those entitled to share" in the resource (384 F.Supp. at 402) and held that, because "[b]y the treaty, the Indians granted citizens of the territory the right to fish in common with them, . . . the state may [also] enforce regulations insuring that both groups have fair access to the fish at the treaty areas."[2] 520 F.2d at 687. But the court found that Washington had not used its regulatory power to effect such fairness.

> Certainly, [the Indians] did not understand that in permitting other citizens access to their tradi-

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[2] Compare the language of this Court in *Puyallup II*: "The aim is to accommodate the rights of Indians under the Treaty and the rights of other people." 414 U.S. at 49. The formula to be used in assuring fair apportionment of harvestable fish is discussed in section III, pp. 21-25, *infra*.

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> tional fishing areas they were submitting to future regulations calculated to benefit those other citizens.
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> Nevertheless, this is precisely how the state of Washington has regulated fishing for years. In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory.

520 F.2d at 685.

The petitioners balk at the requirement of the court below that a "regulation of treaty right fishing must be . . . established by the state, either to the satisfaction of all affected tribes or . . . [the district] court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." 384 F. Supp. at 342. The alarm of petitioners over this requirement is not justified.[3] The district court's supervisory authority does not impede the state unreasonably in its management and regulation of the fishery. Subject to the Indians' right to an equal opportunity to fish, the state may regulate non-Indians to achieve whatever goals it chooses. And the ability of the state to respond to unforeseen conservation needs was preserved by the district court. Emergency regulations (which constitute nearly all of the restrictions

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[3] The apocalyptic fears that Indians will destroy the fishery expressed by petitioners, especially the Northwest Steelheaders Council, are disingenuous. Nothing in the record supports any past history or future likelihood of Indians' abusing the treaty right to the detriment of the resource. In fact, the contrary is true. *See* 384 F.Supp. at 338 n. 26. Even if, as petitioners suggest, Indians desired to use poison or dynamite to harvest fish, or to place their nets across river mouths and entrances to hatcheries, adequate conservation powers remain with the state to prevent such acts.

promulgated during a fishing season) may be imposed upon Indian treaty fishermen *without* prior court review. 384 F.Supp. at 417. Further, the state continues to determine escapement goals and how many fish are harvestable by all fishermen.

Although the tribes may develop in their governing bodies and enforce in their own courts regulations concerning their members' fishing, all proposed regulations must be discussed first with both Fisheries and Game and they must include any state regulations which are reasonable and necessary for conservation. If a tribe has not qualified as "self regulating", the state may enforce regulations which are necessary for conservation directly upon Indian fishermen. Further, the tribes must provide catch reports to the state and permit the state agencies to monitor their off-reservation fishing for conservation reasons.

Even absent strong legal reasons, it would not have been surprising for an equity court to refuse to leave the state as the sole arbiter of which laws are necessary for conservation and shall be applied to Indians. The district court found far reaching abuses of this power by the state in the past. *E.g.*, 384 F.Supp. at 358, 365, 367, 369, 374, 388, 390, 393, 403-04. Indeed, the district court found that "state regulation . . . is highly obnoxious to Indians and in practical application adds greatly to already complicated and difficult problems . . . ." 384 F.Supp. at 339.

The court of appeals pointed out that in regulating Indians the state is "not enforcing state policies but applying federal rights to concrete situations." 520 F.2d at 687. For this reason the district court "wisely" retained approval authority over state regulations of

treaty fishing.[4] To assist in the court's exercise of continuing jurisdiction and assure its ability to respond promptly and intelligently to the needs of the parties it appointed the magistrate to act as a special master and an eminent fishery biologist to serve as its fisheries advisor.

The continuing involvement of the district court in fisheries management in order to protect federally guaranteed rights is assailed by petitioners. This was a concern of the court of appeals, too. But the necessity for it is directly attributable to the petitioners' own demonstrated hostility to Indian treaty fishing.

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sport fishing allies) which produced the denial of Indian rights requiring intervention by the district court.

520 F.2d at 693.

II. Preservation Of A Limited Right Of Tribal Self-Regulation Is Consistent With Congressional Policy And Decisions Of This Court Barring State Interference With Tribal Self Government.

A restriction of state regulatory authority over Indians exercising a federal treaty fishing right does not imply that Indian fishing can take place unregulated. The record shows that historically this has not been the

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[4] In another treaty fishing rights case, Sohappy v. Smith, 302 F.Supp. 899 (D. Ore. 1969) the district court retained continuing jurisdiction. For 6 years the court regularly has determined whether state fishing regulations challenged by Indians are reasonable and necessary for conservation.

case; the Indians have always been concerned for the preservation of the fisheries and have acted responsibly to protect the runs. The district court found that the respondent tribes have governing bodies capable of promulgating and enforcing their own off reservation fishing regulations.

This Court has said recently that Indian tribes possess independent authority and have "attributes of sovereignty over *both* their members and their territory." *United States* v. *Mazurie,* 419 U.S. 544, 577 (1975) (emphasis added). And Congress has fostered the concept of tribal self government through enactment of the Indian Reorganization Act [5] and other legislation [6] designed to strengthen tribal government.

The treaties were not grants to the Indians, but grants to the United States from which the tribes reserved certain rights. This Court has said of the treaties in this case that "[r]eservations were not of particular parcels of land . . . [but rather] imposed a servitude on every piece of land" to make possible continued fishing by the Indians. *United States* v. *Winans, supra* at 381 (1905). There is not the slightest intimation that the Indians thought they would be yielding authority over their fishing right "reservations" to some future government any more than they were consenting to incursion of such authority over lands reserved for their occupancy. "If this power is to be taken away from them, it is for Congress to do it." *Williams* v. *Lee,* 358 U.S. 217, 223 (1959). In another

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[5] 25 U.S.C. §§ 461-479. See Williams v. Lee, 358 U.S. 217, 220 (1959); Morton v. Mancari, 417 U.S. 535, 542 (1974).

[6] *E.g.,* Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341; Indian Self Determination Act, 25 U.S.C. (Supp.) §§ 450-450n.

case involving one of the same treaties the court of appeals found that "[t]he Indians must surely have understood that Tribal control would continue after the Treaty." *Settler* v. *Lameer,* 507 F.2d 231, 236 (9th Cir. 1974).

This Court consistently has barred interference with tribal self government when a tribe's internal affairs are involved. See *Williams* v. *Lee, supra; McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973). The authorization and regulation of tribal members exercising a tribally reserved and held right at a "usual and accustomed fishing place" is as much an internal affair as regulating the conduct of tribal members within land reservation boundaries. And the tribes should be able to determine and pursue their own policies through their regulations just as the Departments of Fisheries and Game utilize their regulatory power over non-Indians to pursue differing policy goals.

The district court recognized this Court's acknowledgement of a sphere of permissible state power over off-reservation Indian treaty fishing. Thus, the state shares jurisdiction over Indian fishing, the limits upon state authority being defined by conservation necessity. Neither the tribes nor the state may preempt the jurisdiction of the other.[7] 384 F.Supp. at 403. But the

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[7] This is not, as petitioners suggest, the "duality of sovereignty" discussed in New York *ex rel.* Kennedy v. Becker, 241 U.S. 556 (1916). There the Court disapproved a division of authority where "either [the Indians or the state] would be free to destroy the subject of the power" because "neither could exercise authority with respect to the other at the *locus in quo.*" 241 U.S. at 563. But here "the essential power of preservation" is maintained in the state.

In any event, *Kennedy* is inapposite. It involved a private transfer of land; not a treaty with the United States. The docu-

state may regulate the fishing of any tribe at any time if it is necessary for conservation. The only exception to this is that a tribe which has met the stringent qualifications and conditions for "self-regulation" must adopt and itself enforce the state conservation measure. 384 F.Supp. at 340-41. A tribe which does not comply may be stripped of its self-regulating status.

"[T]he legitimate conservation interests of the state are not infringed" by allowing tribal regulation subject to court imposed conditions insuring tribal responsibility in the first instance, with a fail-safe providing for the imposition of state regulation if necessary for conservation. 520 F.2d at 686.

III. The Court Of Appeals Properly Upheld The District Court's Equitable Remedies Providing For Fair Apportionment Of Fishing Opportunity.

Based upon anthropological evidence of the Indians' most likely understanding of the treaty language, the fishing practices immediately following the treaties, and definitions of the language found in contemporaneous dictionaries, the district court interpreted the treaty to mean that the parties should be entitled to share equally in the opportunity to fish.[8] At most, "the Indians may have been told or understood that

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ment there preserved "privileges", not rights. And the state was in existence at the time of the transfer in *Kennedy* so exercise of its powers could be anticipated.

[8] Familiar rules of treaty construction demand that treaties be interpreted as Indians would have understood them, *e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970), that any ambiguities be resolved in favor of the Indian parties, *e.g.*, McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973), and that treaty terms be liberally construed in favor of the Indians, Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians". 384 F.Supp. at 357, 355. But "[w]hite civilization has . . . engulfed that of the Indian," and a state policy under which Indian opportunity to fish is determined by their numbers, as it is with other citizens, "effectively allots them a decreasing share of the resource." 520 F.2d at 687.

Petitioners continue to argue that it is "unfair" for Indians, a small minority of the total state population,[9] to be able to harvest more fish per capita than non-Indians. Of such a contention this Court remarked "[t]his is certainly an impotent outcome to negotiations and a convention which seemed to promise more and give the word of the nation for more." *United States* v. *Winans, supra,* 198 U.S. at 380. The Indians could not have intended that their rights "upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed" (*United States* v. *Winans, supra,* 198 U.S. at 381), would be progressively eroded. Furthermore, if the petitioners' reasoning were accepted, the Indian treaty rights would be effectively abrogated by attrition with every change in population that reduced the proportion of Indians. These treaty rights, of course, may only be abrogated by Congress.

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[9] Petition of State of Washington, et al. (No. 75-588) pp. 9, 29; Petition of Northwest Steelheaders Council of Trout Unlimited (No. 75-592), pp. 12, 17, 18. The figure of 794 Indian fishermen, which was a Fisheries Department estimate made prior to trial, is misleading. The record shows that the fourteen tribes party to the case (about half the number of tribes with treaty rights) have memberships totalling about 11,000, many of whom fish or would do so if not prevented by the state.

E.g., Menominee Tribe v. *United States*, 391 U.S. 404 (1968).[10]

The court of appeals approved the district court's decision that "[t]reaty Indians . . . are to have the opoprtunity to take up to 50 percent of the available harvest at their traditional grounds." 520 F.2d at 683.[11] Analogizing to the situation of cotenants, the court noted that

> In each treaty, two parties—the United States and a tribe—bargained on the basis of formal equality. [Therefore, an] attempt to partition equitably rights which these parties were to hold in common must reflect this initial equality.

Thus, it concluded, "the court's apportionment was well within its discretion." 520 F.2d at 688.

When this Court indicated in *Puyallup II* that numbers of harvestable fish must be "fairly apportioned" between Indian and non-Indian fishermen, it recognized some of the difficulties. 414 U.S. at 48. The decision below provides for an "additional equitable adjustment" to solve some of the practical problems of the state in determining and controlling with mathematical precision the numbers of fish of a total run which actually would be available to Indians at their fishing places—typically the "last stop" on the

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[10] Reductions in the non-Indian fishery necessitated by the decision below may be politically unpopular in Washington. The exclusive forum for resolution of political issues, and any modification of the Indian treaty right, is Congress.

[11] The state and its Fisheries Department first suggested an objective, percentage formula to the court (a "one-third" share for Indians of a less inclusive harvestable number). They apparently disagree now not with the fact, but the size, of the percentage.

upstream migration of the fish. The purpose of the equitable adjustment in fishing opportunity is "to compensate treaty tribes for the substantially disproportionate numbers of fish" destined for their fishing places but which are intercepted by non-treaty fishermen who are beyond control of the state. 384 F.Supp. at 344. The court of appeals found the adjustment to be within the district court's equitable discretion to the extent that it adds back into the total number of shared fish those caught by Washington's non treaty citizens while outside the state's jurisdiction.

Also affirmed by the appeals court was exclusion of the on reservation catch from the number of fish to be shared between Indians and non-Indians.[12] That right, of course, derives from another section of the treaty providing for the Indians' exclusive use of reservations and was not the subject of this litigation. In any event, there has been no disagreement between the parties that Indians have an exclusive fishing right on their reservations. The Indians could not have expected or intended that they would be required to share their exclusive on reservation fishing opportunities with non-Indians.

The equitable jurisdiction of a court provides considerable latitude in fashioning relief which is fair and appropriate, based upon the court's knowledge of the facts and the parties. As we have already shown, the actions of petitioners called for specific relief, calculated to remedy a long standing deprivation of federal rights. Careful scrutiny of the evidence con-

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[12] The state did not contest exclusion of fish harvested for subsistence and tribal ceremonial use from the number to be shared. 520 F.2d at 690.

cerning the treaty negotiations and the meaning of treaty language to the Indians, as well as evidence on the realities of fishery management, led to a decision providing for equal sharing of fishery opportunity. Far broader exercises of equitable discretion in other complicated situations regularly have been sustained by this Court.[13] Here the district court not only operated well within its discretion in fashioning a remedy to fit the problems it was asked to solve, but also made an apportionment of the right in a manner which "best effectuates what the Indian parties would have expected . . . ." 520 F.2d at 688.

IV. The 1937 Convention With Canada Does Not Conflict With The Indian Treaties.

The Convention Between the United States and Canada for the Protection of Fraser River Sockeye and Pink Salmon, 50 Stat. 1355 (1937), as supplemented by T.I.A.S. 3867, 8 U.S.T. 1058, provides for an equal division of the salmon harvest of the Fraser River between the two countries. The decision below is concerned only with allocation as between Indian and non-Indian fishermen of the United States' share of the fish.

The district court ruled that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [set up under the convention] must comply with regulations of the Commission." 384 F.Supp. at 411. In affirming the court of appeals held that "all persons, including Indians, [are] subject to Commission regulations."

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[13] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) (school desegregation); Reynolds v. Sims, 377 U.S. 533, 585 (1964) (reapportionment).

520 F.2d at 690. To the extent the tribes are prevented from having an equal opportunity to harvest the United States' share of fish, because such harvests are beyond state regulation, an equitable adjustment must be made in fishing opportunity under the state's jurisdiction.

It seems clear that the 1937 Convention and legislation implementing it do not conflict with, and could not have been intended to abrogate, the Indian treaty fishing right. To so hold would be contrary to all established authority. See Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975).

Petitioners complain that since the decision below they have been ordered by the district court to disobey commission regulations. They do not state fully the circumstances of the controversy. In any event, that dispute is now before the Ninth Circuit Court of Appeals pursuant to petitioners' notice of appeal dated October 2, 1975. It is not properly here.

V. In The Absence Of A Congressional Grant Of Authority The State May Not Regulate Or Restrict The Exercise Of Treaty Fishing Rights.

Respondent Indian tribes urge by way of a conditional cross petition that if the Court grants certiorari, it should also review the threshold questions of whether or not prior decisions of this Court allowing state regulation of federal treaty rights are correct in the circumstances of this case.

In *Puyallup I* this Court held that "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources, is pre-

served." 391 U.S. at 399. Respondents believe that the decision below is entirely consistent with this precedent, but they have argued throughout the litigation that *Puyallup I* is not correct.

The district court devised a system of fisheries regulation and allocation which is fair to all and which will resolve a long and bitter dispute. Respondent tribes recognize the value of maintaining an equitable, practical solution which has been in effect for nearly two years. They also recognize that it was necessary for the court to vest ultimate conservation regulatory authority in the state under *Puyallup I*. The intent of the treaties was effectuated, but the exercise of rights under them was subjected to state police power. Consequently, if petitioners' challenges to this system are to be considered by the Court, so should be the challenge of the tribes to the existence of any regulatory authority in the state.

The supremacy clause of the United States Constitution mandates that a federal treaty concerning the taking of game overrides state game regulation power. *Missouri* v. *Holland,* 252 U.S. 416 (1920). Congress has especially broad prerogatives in the area of Indian affairs which exclude most exercises of state power. *E.g., Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965). And only express congressional acts can extend jurisdiction over Indians. *E.g., McClanahan* v. *Arizona Tax Commission, supra; Mattz* v. *Arnett,* 412 U.S. 481 (1973). Although state law generally can be applied as against Indians outside the reservation, there can be no application where, as here, it would "impair a right granted or reserved by federal law." *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973). The preemptive authority of federal laws

concerning off-reservation activities of Indians regularly has been upheld. *E.g., Johnson* v. *Gearlds,* 234 U.S. 422 (1914). See also *Antoine* v. *Washington, supra.*

It has often been said that Congress may modify or abrogate Indian treaties unilaterally, or extend jurisdiction over Indian affairs all or in part to the states. Congress has done both in specific instances but it has never done so with respect to the treaty fishing rights here in question.[14] The only act of Congress granting jurisdiction over Indians to states (including Washington) prohibits the exercise of any jurisdiction which would deprive Indians of rights to exercise or control treaty fishing rights. 18 U.S.C. § 1162. See *Menominee Tribe of Indians* v. *United States, supra.*

The record establishes beyond question that the Indian parties did not intend to submit their fishing rights to the control of any then non-existent non-Indian authority. Nothing in the record or the treaties can support a contrary interpretation, especially in view of the rules of Indian treaty construction.[15]

In response to the contentions of the Indian tribes, the district court analyzed in some detail the decisions relied upon by the Court in *Puyallup I* for the proposition that there is state power over Indian treaty fishing. 384 F.Supp. at 334-39. The court found that

> to the present time there never has been either legal analysis or citation of a nondictum authority

[14] The district court cited three instances in which Congress has failed to enact proposed legislation to terminate the Indian treaty fishing rights which are the subject of this case. 384 F.Supp. at 338 n. 24.

[15] See *supra* note 8.

> in any decision of the Supreme Court of the Land in support of its decisions holding that *state* police power may be employed to limit or modify the exercise of rights guaranteed by national treaties which the federal Constitution mandates must be considered and applied as "the supreme Law of the Land."

384 F.Supp. at 338.

Nevertheless, the court felt bound by judicial duty to conform its decision to Supreme Court authority and therefore rejected the tribes' contentions. The tribes appealed, but the court of appeals upheld the district court decision, stating simply that the tribes' "assertion is foreclosed by the decision in *Puyallup* . . . ." 520 F.2d at 682 n. 2.

The decision in *Puyallup I* has been sharply criticized as not soundly based and out of line with other Indian cases. *E.g.*, Johnson, *The State Versus Indian Off Reservation Fishing: A United States Supreme Court Error*, 47 WASH L. REV. 207 (1972). It was decided on a record with little or no evidence concerning the negotiation and meaning of the treaties. Furthermore, the biological evidence was nearly all from the perspective of state fish managers. And the Court had before it a stipulation not based in fact which raised the specter of unbridled, destructive Indian fishing. See 391 U.S. at 403 n. 15. By contrast, this case has a complete record of anthropological and biological facts upon which a decision on the propriety of state regulatin of Indian fishing can be made soundly.

Any consideration of the decision below by this Court should include a review of *Puyallup* which was the legal foundation for subjecting respondents' treaty rights to state regulation.

CONCLUSION

The Court should deny the petitions for certiorari. However, should the Court grant the petitions in Nos. 75-588 and 75-592 it should also grant respondents' conditional cross-petition so that there can be a full review of the decision below and its underpinnings.

Respectfully submitted,

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November, 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-588

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-592

NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 35-56),[1] is reported at 520 F. 2d 676. The order amending the opinion is set forth at Pet. App. 57-58. The opinion, findings of fact, conclusions of law, injunction and interim plan and stay order of the district court are reported at 384 F. Supp. 312. The opinion alone is reproduced at Pet. App. 59-92.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1975, and a timely petition for rehearing was denied on August 4, 1975. The petitions for a writ of certiorari were filed on October 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly declared the treaty rights of the plaintiff tribes.

2. Whether the injunction framed by the district court was an appropriate remedy for the continuing violation of treaty rights that it found.

3. Whether the decision of the court of appeals infringes the Convention of May 26, 1930 (50 Stat. 1355) between the United States and Canada.

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[1] Unless otherwise noted "Pet. App." refers to the Appendix to the petition in No. 75-588, *State of Washington, et al.* v. *United States of America.*

4. Whether the decision of the court of appeals conflicts with the decision of the Washington Superior Court on remand in *State of Washington* v. *Puyallup Tribe, Inc.*, No. 158069, April 8, 1975, and if so, whether review by this Court is appropriate at this time.

5. Whether the evidence supports the findings by the district court that non-Indian reef-net fishermen have pre-empted the usual and accustomed grounds and stations of the Lummi tribe.

TREATIES INVOLVED

The treaties involved are the Treaty of Medicine Creek (10 Stat. 1132); the Treaty of Point Elliott (12 Stat. 927); The Treaty of Point no Point (12 Stat. 933); The Treaty with the Makahs (12 Stat. 939); The Treaty with the Yakimas (12 Stat. 951); and the Treaty of Olympia (12 Stat. 971). With immaterial variations these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: * * *.
>
> ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

1. The commencement of litigation and findings of fact.

In September 1970, the United States, on its own behalf and as trustee for several Indian Tribes of the State of Washington,[2] brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian Tribes.

The essential questions to be decided were the measure of the fishing rights provided the Tribes by treaty, whether the then-existing state regulatory scheme infringed upon those rights, and, if so, what relief should be granted.

After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, 384 F. Supp. at 348-

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[2] Additional Tribes intervened; the Tribes originally represented by the United States intervened on their own behalf or obtained private counsel. The Washington State Department of Fisheries and Washington State Game Commission, their respective Directors, the Washington Reef Net Owners Association and, in the court of appeals, the Northwest Steelheaders Council of Trout Unlimited, subsequently intervened as additional defendants.

399), which are not contested by the parties [3] and are amply supported by the evidence. Essentially the court found that the treaty Tribes fished for trade as well as subsistence and ceremonial purposes at the time the treaties were made (Findings 2-14, 384 F. Supp. at 350-353). In negotiating the treaties the Tribes were willing to restrict their residence to reservations and were willing to give up claims to large areas of land, but they insisted, and the United States agreed, that they could continue to fish in their usual and accustomed places off the reservations although they would have to share those fisheries with the citizens of the territory (Findings 19-28, 384 F. Supp. at 355-357).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, 384 F. Supp. at 357; Findings 29-34, 384 F. Supp. at 357-358). Many of the Tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, 384 F. Supp. at 358-387).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those measures favored non-Indian fisher-

[3] Except those concerning reef-netting near the Lummi reservation, which are contested by the Washington Reef Net Owners Association.

men to the detriment of the treaty-fishermen. More specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, 384 F. Supp. at 388); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, 384 F. Supp. at 358); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194, 195, 384 F. Supp. at 388).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, 384 F. Supp. at 393).

There was no showing that the tribal fishing on reservation, which had been free of State control,[4]

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[4] See Pet. App. 66 and n. 2. See also, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 Pac. 557.

had been detrimental to conservation, although many of these reservations straddle the mouths of major river systems, thus making the essential spawning escapement for any run dependent upon passage through them. As to off-reservation fishing the court noted (Pet. App. 77, n. 26):

> With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

2. The position of the parties, and the relief requested.

The Washington State Game Commission (Game) argued that except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) is valid.[5] The Washington State Department of Fisheries, contrary to Game, recognized that the treaties in question provided the Tribes with

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[5] Game, Pre-Trial Br., p. 3; Final Pre-Trial Order, pp. 79, 137; see also Game, C.A. Br., pp. 57, 59, 61.

special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pre-Trial Br., p. 2; Final Pre-Trial Order, pp. 137-138). It contended that its regulations are a lawful exercise of State police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of the State of Washington in the case area" (Fisheries Pre-Trial Br., pp. 8, 22; see also p. 2). In its post-trial brief (p. 36) and in argument in the district court (Tr. 4384) Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the Tribes.

The Tribes argued that the State is without authority to regulate their fishing, that the State has no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and the State contrary to the treaties, is preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to water rights in *Winters* v. *United States*, 207 U.S. 564 (see, *e.g.*, Muckleshoot, et al., Pre-trial Br., pp. 8-11).

The United States conceded that the State has the power to regulate off-reservation Indian fishing, but only if it is shown that the regulation is reasonable

and necessary for conservation, meets appropriate standards, and does not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that Tribes which can show their ability to regulate themselves should be permitted to do so; and that non-Indian fishing should be regulated in such a manner as to permit the Tribes at their off-reservation fisheries the opportunity to catch as many fish as needed to fill their needs, but because of the requirement of fishing "in common with citizens of the Territory," the Tribes, in their off-reservation fisheries, are entitled to not more than 50 percent of the harvestable portion of the runs involved (Respondent's Post-Trial Br., pp. 81-84).

3. The district court's rulings.

The district court held that each of the plaintiff Tribes under the several treaties at issue had reserved to itself and its members an exclusive right of fishing within their reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory" (Pet. App. 66). As to the scope of the right the court held (Conclusion 20, 384 F. Supp. at 401):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exists in part to provide a volume of fish which

> is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

The court further held that the right of a treaty Tribe to take anadromous fish may be regulated by the State, but only if such regulation (a) does not discriminate against the treaty Tribe's reserved right to fish, (b) meets appropriate due process standards and (c) is shown to be both reasonable and necessary to preserve and maintain the resource (Conclusion 29, 384 F. Supp. at 402).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (384 F. Supp. at 411).

The court reserved the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights for a subsequent hearing, preparation for which is now underway (see 384 F. Supp. at 411).

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[6] See also Conclusions 21-29, 384 F. Supp. at 401-402.

4. The relief granted.

The court held that in light of the facts found, plaintiffs "are entitled to injunctive relief against the continuation and repetition of acts and omissions which are in violation of the treaty-secured rights of the plaintiff tribes and their members" (384 F. Supp. at 413).

In the injunction the court recognized the overriding authority of the State in preserving the fishery (Injunction, par. 8, 384 F. Supp. at 415) and provided for state emergency regulations over all tribal off-reservation fishing without prior court approval (Injunction, par. 19, 384 F. Supp. at 417). The court, however, provided that Tribes meeting certain standards (Pet. App. 80-81) would be permitted to regulate their own off-reservation fishing subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the Tribe (Injunction, par. 2, 384 F. Supp. at 414). Tribes not meeting the qualifications would be subject to state regulation in their off-reservation fishing but the State must establish to the satisfaction of the Tribe or, if the Tribe is dissatisfied, the court in advance that its regulations conform to the requirements of the decision (Injunction, par. 3, 384 F. Supp. 414-415).

The court also directed the State to reduce non-Indian fishing of runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty Tribes to the extent nec-

essary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State, the court established a formula for determining the maximum extent of the Tribes' entitlement (Pet. App. 84-87; see also Pet. App. 46-50). The formula provides basically that the Tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in the one-half (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the Tribes as to the types of gear they expect to use and the quantity of fish they expect to be able to take, and to take account of such information and the limits of the Tribes' entitlement in making its predictions and regulations for the coming season (Injunction, par. 17, 384 F. Supp. at 417). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (384 F. Supp. at 420).

5. The decision of the court of appeals.

The court of appeals, in a thorough opinion (Pet. App. 35-56) affirmed. It emphasized that the Tribes, in the treaties giving up their lands, expressly reserved the fishing rights in question and that those rights exist as a matter of federal law. It held (Pet.

App. 42) that the State "[i]n treating Indian fishermen no differently from other citizens of the state * * * has rendered the treaty guarantees nugatory."

Citing *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392, the court rejected the Tribes' contention that they could not be subject to state regulation if necessary for conservation; but the court emphasized the burden of the State to show that its regulations, as applied to Indian fisheries, are necessary to conservation (Pet. App. 42-44).

The court further held that the Tribes were entitled to equitable relief (Pet. App. 39). It reviewed and approved the relief granted by the district court (Pet. App. 46-53). The court noted (Pet. App. 46) that "[t]he district court's apportionment does not purport to define property interests in the fish * * *. Rather, the court decreed an allocation of the *opportunity* to obtain possession of a portion of the run" (emphasis in original). It also noted that (*ibid.*):

> The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

In so holding, however, the court made the important clarification that the adjustment established by the district court for fish taken before they reach the treaty fishing grounds should not take account of fish caught by non-Washington citizens outside the state's jurisdiction (Pet. App. 55). The court remanded the case to the district court's continuing jurisdiction (*ibid.*).

ARGUMENT

1. The special fishing rights reserved to the respondent Tribes in the treaties in question have been recognized by this Court in *United States* v. *Winans*, 198 U.S. 371, and *Tulee* v. *Washington*, 315 U.S. 681, and, more recently, *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup* I) and, after remand, *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup* II). These decisions have made clear at least the following propositions as to treaty protected Tribes:

1. The Tribe has an exclusive fishing right on its reservation.
2. It has off-reservation rights which the State is not free to limit as it can the fishing privileges of other citizens.
3. The State may regulate Indian off-reservation fishing but only if the regulation is necessary for conservation and does not seek to accomplish that conservation goal through imposing unfair sacrifices on Indian fishing for the benefit of non-Indian fishing.
4. Both on and off-reservation rights are reserved rights retained by the Indians in the bargain by which they gave up large areas of land; they must be preserved in a meaningful manner, assuring the Indians their share of the available catch according to a formula to be worked out.

But despite these established principles, the Tribes have been repeatedly deprived of the fishing oppor-

tunities provided them by treaty, as the courts below found. See also *Puyallup* II, *supra*, 414 U.S. at 48. The district court's task in this case was thus, as a court of equity, to establish a remedy that would assure the protection of these rights. Part of the remedy, at the request of the State and the United States, was the establishment of a percentage for determining the fishing opportunity of the Tribes as to the runs that pass through their usual and accustomed grounds. Another part of the remedy was to minimize daily conflict by recognizing the responsibility as well as the rights of the Tribes and the duties of cooperation between the Tribes and the State under overall state control.

The State (No. 75-588, Pet. 11-16) and Northwest Steelheaders (No. 75-592, Pet. 25-30) argue that allowing any Indian self-regulation of off-reservation fishing is in direct conflict with *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556. In that case the Court held that a reservation by the Seneca Nation of a privilege of fishing in a lake on land they had ceded to an individual did not exempt them from state regulations prohibiting spear fishing. The Court emphasized the right of the State to regulate fishing and refused to interpret the treaty as having a contrary intent. The Court pointed out that the regulation applied equally to Indians and non-Indians and thus did not discriminate against the Indians (*id.* at 562).

Here, by contrast, treaties agreed to under different circumstances and containing different language, have been held by this Court to create fishing *rights* which can only be limited if necessary for conserva-

tion of the fishery. The Court has specifically rejected the concept that subjecting Indians and non-Indians to identical state regulation is consistent with the treaties (*Puyallup II*, *supra*, 414 U.S. at 48). Moreover, here, in contrast with *Kennedy*, the courts below found abuse by the State in the substance and enforcement of its regulations. In sum, *Kennedy* was not concerned with, and does not prohibit, the kind of specific relief granted in the particular circumstances, and in light of the history, of this case.

Moreover, unlike the situation in *Kennedy*, the district court here (over the objections of the Tribes), carefully preserved the State's right to supersede tribal regulation. Even the Tribes that qualify as self-regulating have an exemption from State regulation only so long as they continue to meet the qualifications and conditions prescribed in the district court's decision (which include reporting to the State and permitting state monitoring) and are always subject to state emergency regulations.

This limited self-regulation permitted the Tribes is consistent with the district court's findings that the Tribes had not threatened conservation in their previous fishing and that (Pet. App. 77):

> "state regulation of off-reservation treaty right fishing is highly obnoxious to the Indians and in practical application adds greatly to already complicated and difficult problems and may stimulate continuing controversy and litigation long into the future."

Nor, contrary to the State's contention (No. 75-588, Pet. 14-16) does this limited self-regulation violate principles of territoriality. The treaties establishing the Reservations provided for the off-reservation fishing rights as part of the same bargain, and those grounds, for fishing purposes, are properly considered as analogous to territorial waters of the Reservations and not extra-territorial. In any event, the Tribes, through custom and later through written regulations, have apportioned and regulated the use of this tribal right by their members. This intra-tribal regulation, at least, is a matter of tribal self-government within the competency of the Tribe (see *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-173) and the Ninth Circuit, in a prior case, specifically held that a Tribe may enforce such regulations against a tribal member by arrest at the fishing grounds. *Settler* v. *Lameer*, 507 F.2d 231.[7]

2. The State argues (No. 75-588, Pet. 16-19) that the district court's restriction of state regulation conflicts with this Court's decisions in *Puyallup I* and *Puyallup II*, as well as earlier decisions, because those decisions upheld the State's police power "to regulate Indian off-reservation fishing provided its regulations were reasonable and necessary for conservation and non-discriminatory" (Pet. 16). In this case, however, the State of Washington's regulation of off-reservation fishing by Indians was neither rea-

[7] Even if that were not so, the regulations could be enforced by denial of tribal fishing rights to errant tribal members, thus subjecting such members to direct state jurisdiction.

sonable and necessary for conservation nor non-discriminatory, but in fact constituted a significant and unwarranted diminishment of the Indians' treaty-guaranteed fishing rights. The district court's remedy, as clarified by the court of appeals, is based on the particular abuses revealed by the evidence. As a pattern of cooperation develops, the decree can no doubt be modified, but at the moment it serves to make real the rights recognized by this Court since 1905 in *Winans* and most recently in the *Puyallup* cases. As Judge Burns stated in his concurring opinion below (Pet. App. 56):

> The record in this case, and the history set forth in the Puyallup and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.[8]

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[8] For the reasons expressed above and in paragraph 1, *supra*, the Northwest Steelheaders argument (No. 75-592, Pet. 30-44) that the decision below violates *Milliken* v. *Bradley*, 418 U.S. 717, is not well taken. First, the remedy does not exceed the scope of the violation of rights found by the district court. The court specifically found that state fishing regulations and enforcement had infringed on the off-reservation fishing rights of the Tribes and the injunction was directed to those violations. Compare *Milliken*, 418 U.S. at 744-745.

Second, the court has carefully *preserved* the overriding regulatory power of the State. The parade of horribles stated by the Steelheaders is entirely unrealistic. The State has not sought to regulate on-reservation fishing; thus the un-

3. The State (No. 75-588, Pet. 19-22) and the Steelheaders (No. 75-592, Pet. 45-51) argue that the courts below should not have "quantified Indian fishing rights in terms of a percentage of the harvest" (No. 75-588, Pet. 19). Yet, as we have discussed (p. 8, *supra*), the State requested such a quantification so that escapement goals could be computed. The State, however, suggested an arbitrary one-third division between treaty fishermen, commercial fishermen and sports fishermen—a division having no connection with the intent or language of the treaties and in effect splitting one party to the treaty into two parties. The district court found, and the court of appeals agreed, that the division supported by the treaty, while necessarily being an approximation, must be based on a 50-50 division of the fishing opportunity for those runs that pass through the usual grounds and stations of the tribe (see Pet. App. 84-87, 47-48).[9]

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realistic fear of Indians blocking a river running through their reservation or stretching a net across the outlet of a fish hatchery on such a river (No. 75-592, Pet. 35-36) is not an issue in this case. Moreover, a state emergency regulation could instantly prohibit such an action off-reservation. Nor is regulation of mesh size, times of fishing, and the like prohibited by the decree where necessary for the conservation of any species, even those not the direct subject of the regulation. (Compare No. 75-592, Pet. 41-44.)

[9] Reservation takes are excluded from this figure because the treaties contemplated exclusive Indian fisheries there; off-reservation ceremonial and subsistence fishing were excluded as *de minimis*. The "equitable adjustment" compensates for fish destined for Indian grounds but caught by non-Indians before they reach those grounds. See Pet. App. 46-50.

But it should be clear that the 50 percent guideline is not a guarantee of any harvest. It is simply a readily understandable measure of what portion of the harvest the Tribes as a group may rightly insist they should have a *chance* to take in variable circumstances. The shares worked out for specific runs in particular years with specific Tribes will vary from the guideline, in accordance with the extent of Indian fishing capability, the size of the run, the degree of Indian and non-Indian interest in the run, and the give and take of cooperative operations (see p. 12, *supra*).

The State argues (No. 75-588, Pet. 21-22) that the decree has "financially destroyed" some non-Indian fishermen and has "seriously depressed" the non-Indian fishing industry. The State refers to no data in support of this. Since there is no evidence that the decree has either increased or decreased the total fishery, it is true that to the extent the Indian catch has increased, the non-Indian catch has been decreased. Nothing suggests, however, that the total Indian fishery involved here has increased even to the one-third suggested by the State. Indeed, to the degree that the Indians are few (see No. 75-588, Pet. 20-21) or poor, their ability to catch a significant percentage of a major run is reduced and the decree is adjustable by their actual experiences (see p. 12, *supra*).

4. The State argues (No. 75-588, Pet. 23-28) that the courts below erred in not declaring that the Convention of May 26, 1930, between the United States

and Canada, 50 Stat. 1355, abolished Indian fishing rights as to Fraser River salmon. The Convention established the International Pacific Salmon Fisheries Commission (IPSFC) as a regulatory body and provided for an equal division of fishing rights as to Fraser River salmon between Canada and the United States.

The decision below presents no issue regarding that Convention requiring further review. Both the district court (384 F. Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.

The courts below also correctly held (*ibid.*) that the Convention did not repeal the treaties with the Indians in regard to Fraser River salmon. Under the Convention and implementing statutes and regulations, the fishermen of the United States are entitled to take one-half of the Fraser River sockeye and pink salmon run. Since the treaties between the United States and the Indian Tribes deal only with rights and powers within the United States' jurisdiction, their provisions can apply only to the United States' half. Nothing in the 1930 Convention, however, conflicts with the Tribes' rights to harvest a fair share of the United States' portion if they are part of the runs passing through the Tribe's usual fishing grounds. Since the Convention is thus not in conflict with the earlier treaties it cannot be held to have tacitly re-

pealed them. *Menominee Tribe* v. *United States*, 391 U.S. 404, 413; *United States* v. *Payne*, 264 U.S. 446, 448; *United States* v. *Lee Yen Tai*, 185 U.S. 213, 221; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

The Steelheaders (No. 75-592, Pet. 51-55), apparently joined by the State (No. 75-588, Pet. 27-28), argue that the decision of the court of appeals sanctions district court interference with the foreign policy of the United States through sanctioning disobedience of IPSFC regulations. This is incorrect. As we have demonstrated, both courts below specifically recognized the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission they are not sanctioned by the decision under review.[10]

5. The Steelheaders argue (No. 75-592, Pet. 56-59) that the Court should grant review to resolve a possible conflict as to rights to hatchery fish between

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[10] Since the decision, the United States through its membership in IPSFC and through diplomatic channels has sought to have the IPSFC alter its regulations to take account of a special Indian fishery within the United States entitlement, by modification of time and equipment requirements adopted for a more efficient commercial fishery. The post-decision proceedings, which the State characterizes as requiring a violation of IPSFC regulations (No. 75-588, Pet. 27-28), are concerned with the same general subject as this negotiation. The State proceeding is described as presently on appeal to the State Supreme Court (No. 75-588, Pet. 27-28), and review here is thus inappropriate. No direct review of the denial of interim relief by the court of appeals has been sought. Moreover, the specific subject of those suits is now moot (see No. 75-592, Pet. 55) and the general issue may be resolved by negotiation within the IPSFC.

the decision below and that of the state court on remand of *Puyallup II*. But as they point out (No. 75-592, Pet. 56-59), the state superior court decision has been appealed to the Washington Supreme Court, which has not ruled on it. Moreover, this is an issue not yet ruled on by the district court or court of appeals in this case (see p. 10, *supra*). Thus any potential conflict (and there may be none) is not ripe for resolution.

6. The Washington Reef Net Owners Association seek review (No. 75-705, Pet. 2) of the single question whether its members are operating in what were, at treaty times, "usual and accustomed grounds and stations of the Lummis." Both the district court and court of appeals have resolved this largely factual question against petitioners and further review is not warranted. The opinion of the court of appeals, at Pet. App. 50-53, fully discusses and properly rejects petitioner's argument.

CONCLUSION

The remedy provided by the courts below is a careful application of the principles announced by this Court to the detailed facts of this case. It contains its own mechanisms for modification as experience is obtained in its application. For these and the reasons set forth above, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1976.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 211976 185

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IN THE

Supreme Court of the United States

October Term, 1975
Nos. 75-588, 75-592, 75-705

STATE OF WASHINGTON, et al., *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al., *Respondents,*
and
NORTHWEST STEELHEADER COUNCIL OF TROUT UNLIMITED, *Petitioners,*
v.
UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, et al.,
and
WASHINGTON REEF NET OWNERS ASSOCIATION, et. al., *Petitioner,*
v.
UNITED STATES OF AMERICA, et al., *Respondents.*

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT—FILED ON BEHALF OF PURSE SEINE VESSEL OWNERS ASSOCIATION, PUGET SOUND GILL NETTERS ASSOCIATION, WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, WASHINGTON KELPERS ASSOCIATION, NORTHWEST FISHERIES ASSOCIATION AND WEST COAST TROLLERS ASSOCIATION

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BASIS FOR FILING OF *AMICI CURIAE* BRIEF

This *amici curiae* brief is filed pursuant to Supreme Court Rule 42 and the unanimous consent of all of the parties. The written consents have been filed with this Court.

INTEREST OF *AMICI CURIAE*

Amici curiae are associations of commercial fishermen, vessel owners and processors. Their members fish all waters encompassed by the case area and take all species of sal-

mon which are involved in this case. Combined, their members catch over 90% of the commercial salmon taken by non-Indians in the case area. They employ every method of commercial fishing except reef nets. These include purse seining, gill netting, trolling, onshore trolling, or "kelping", and commercial operation of sport fishing charter boats. Their investment in vessels alone is estimated at more than $150,000,000.00.

Although the economic impact of this decision falls almost entirely on *amici curiae* and its members, they were not parties and those who sought to intervene were denied the right to do so, and continue to be denied the right to intervene under the district court's "continuing jurisdiction".[1] By comparison, the district court has permitted intervention by every Indian tribe that requested the right to do so.

Amici curiae were permitted to appear as *amici curiae* before the Court of Appeals for the Ninth Circuit.

REASONS FOR SUPPORT

1.

Neither the District Court Decision Nor the Circuit Court Decision Are Supportable by the Authorities, Treaty Language, Findings of Fact, or Logic

The different Stevens treaties all utilized approximately the same language:

---

1. A group represented by the Washington Reef Netters Owners Association had been permitted to intervene by another district court judge. However, its fishing is limited to a small area of northern Puget Sound and use of stationary gear. Much of that group's concern is a factual issue unique to them: whether present reef net sites and gear are different from Indian reef net sites in treaty times. Purse seiners, gill netters, trollers, "kelpers", charter-boat operators and processors were not parties to the case below.

> "The *right of taking* fish, *at all usual and accustomed grounds and stations*, is further secured to said Indians, *in common with all citizens*. . . ." (Emphasis supplied)

Except for these reserved rights, the Indians ceded sovereignty over all lands and waters outside their reservations. They reserved no rights to fish other than at their "usual and accustomed grounds and stations", agreed that non-Indians could fish in common with them at their usual and accustomed fishing grounds and placed no restrictions on the non-Indians' use of ceded lands and waters.

The district court expressly found that the Treaty Indians understood the restrictive nature of "usual grounds and stations" (F.F. 24, R. 1598), and further found that:

> ". . . the Indian's harvest of fish was subject to the vagaries of nature which occasionally imperiled their food supply and caused near starvation. The amounts of fish that could be harvested were particularly affected by run-size fluctuations caused by natural conditions and water conditions occurring at the time the fish were running, e.g., flooding, which limited the effectiveness of Indian fishing gear." (F.F. at 6, R. 1584)
>
> ". . . George Gibbs noted that:
>
> " 'As regards the fisheries, they are held in common and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season.' " (F.F. at p. 10, R. 1588)
>
> ". . . The Indians were assured by Governor Stevens and the treaty commissioners that they would be allowed to fish, but the white man would also be allowed to fish . . ." (F.F. 20, p. 16, R. 1594)
>
> ". . . there is no evidence at the time of the treaties

that either party intended to restrict the other party's fishing . . ." (F.F. 28, at p. 22, R. 1600)

Conversely, there was no finding whatsoever that there was any Indian cultural concept or understanding of being entitled to own or catch any fixed quantum or proportion of fish.

Notwithstanding, the district court ruled, as a matter of law, that the words "in common with" gave the Indians an inheritable right to catch 50% of the harvestable fish. The only basis for this ruling, other than a reference to treaty interpretation rules which enjoin liberality, and the only legal precedent ever cited by the court or the plaintiffs for this startling interpretation of the treaty words "in common with" is a definition of the word "common" from 1828 and 1862 editions of Webster's American Dictionary of the English Language (F.F. 24, p. 19, R. 1597). The full language of this definition reads:

> "1. 1. *Belonging equally to more than one, or to many indefinitely*; as life and sense are common to man and beast; *the common privileges of citizens*; the common wants of man. 2. *Belonging to the public*; *having no separate owner*. The right of a highway is common. 3. General; serving for the use of all . . ." 1828 ed. Webster's American Dictionary of the English language.
>
> (Emphasis supplied)

The first point to remember therefore is that the extraordinary innovations in the decisions and orders below were basically contrived from this dictionary definition without the benefit of any direct legal precedent.

It is to be noted that plaintiffs (respondents before this Court) constantly refer to the district court's decision as giving the Treaty Indians not 50% of the fish but merely

the opportunity to catch up to 50% of the fish. This is a distinction with no difference because the court's decree provides that the non-Indian fishing activity must be cut back until the Indian quota is taken. The quotas are determined by counting the fish caught. As the modern non-Indian fishery is a predominantly marine fishery and as salmon in the case area are mostly taken while migrating towards terminal areas, any closure of the marine fishery means that the salmon are permanently lost to the non-Indian fishermen.

Furthermore, the district court held, contrary to established law, that fishing by non-Indians is a mere privilege, not a right, and as such is revocable at will. The significance of this questionable premise in the framing of the court's decree is that it facilitates the restriction and curtailment of the non-Indian's fishing rights and his access to the common fishery in state waters, with total impunity and, we submit, without regard for constitutional protections.

The premise that a citizen's right to fish is a mere privilege is erroneous. *Martin v. Lessee of Waddell,* 16 Pet. 367 (1842); *Smith v. Maryland,* 18 Howard 71 (1855); *McCready v. Commonwealth of Virginia,* 94 U.S. 391 (1877); *Geer v. Connecticut,* 161 U.S. 519 (1896); *Toomer v. Witsell,* 334 U.S. 385 (1948); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948). See also: *Department of Game v. The Puyallup Tribe,* 414 U.S. 44 (1973). Furthermore, there is nothing in the language of the treaties, the record or the findings of fact to indicate any intent to treat the non-Indians' right to fish "in common" as inferior to the Indians or to permit the Indians to impose or require

restrictions on non-Indian fishing activities in the ceded territory. If anything, the record indicates that such positions were contrary to the understandings and cultural concepts of both parties to the treaties.

The district court then held that *in addition* to the 50%, the Indians are also entitled to: 1. all the salmon they catch on their reservations; 2. all they catch for ceremonial purposes; 3. all they catch to eat; 4. all they catch as participants in the all-citizen fishery whether on or away from their usual and accustomed grounds and stations; plus 5. an "equitable" adjustment for the number of fish caught by non-Indians outside the jurisdiction of the state of Washington.

The Court of Appeals for the Ninth Circuit did not rule on the propriety of the district court's holding that the words "in common with", as a matter of law, entitled the Indians to 50% of all harvestable salmon and steelhead plus the various additional allotments. The court of appeals instead went off on a theory of its own creation. It analogized the treaty language to a cotenancy in the fish and the litigation to a request for a partition. This application of "ownership" principles is totally foreign to cultural concepts and understandings of all parties to the treaties as established by the district court's findings of fact. Furthermore, the court of appeals failed to apply the same theory and standards of accountability to the Indians with regard to their fishing activities—particularly away from the usual and accustomed grounds and stations.

Ultimately, the court of appeal's decision rests upon a purported affirmance of the district court's exercise of "discretion" so as to "best protect the interests of all parties, as

well as those of the public". In fact, the district court did not, and did not purport to, exercise any discretion—it ruled as a matter of law, based on a misapplied interpretation of a definition in an 1828 English language dictionary, as to the meaning of the treaties. Nor did the district court at any time consider, balance or protect the interests of the non-Indians, the public, the State, or the Nation. Aside from a paternalistic mention in Finding of Fact 29 that "fishing is also important to some non-Indians" (R. 1601) the findings of fact and opinion basically ignore the circumstances of the 99.72% of the citizens in the case area who are not Indians. Nowhere in the findings of fact or opinion—which deal at great length with the importance of salmon to the Indian—is there any analysis of the importance of the salmon to the non-Indian or of the impact of the mandated closures and restrictions upon the non-Indian. There is no word that the Pacific salmon is a treasured public resource, the most valuable fishery in the United States, of all floating fish; no word that the Pacific salmon is a subject of intense international competition with aggressive fishing competitors as Japan, Russia and Korea, requiring the enterprise of American fishermen and sensitive international compacts, all exerted in our national interest.

The granting of a permanent 50% plus ownership in anadromous fish to tribal members is necessarily arbitrary and illogical. A quantified ownership bears no relationship to the number of Indians who actually fish, of all Indians, or to the number of Indians who fish compared with the number of non-Indians who fish, or to the number of Indians who fish now as compared to in 1855, or to the importance of fish in their livelihood now as compared to

in 1855 or to any other standard. If but one single Indian remained he would still have a hereditary right to 50% plus of all fish in his ancestral fishing grounds, whether he fished or not. The fallacy here lies not in the selection of any particular percentage. It lies in deciding this question in terms of *any* permanent percentage, and in interpreting the language of the Stevens treaty in terms of ownership concepts which are foreign to the treaty language, established law and Indian cultural concepts.

It is significant to note that neither the district court nor the court of appeals analyzes this result from the standpoint of equal protection principles which this Court has recognized as being required in the application of the specific language and treaties now before this Court.

> ". . . [We] add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with'" *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 403 (1968).
>
> "The case was remanded for determination of . . . 'the issue of equal protection implicit in the phrase "in common with"' as used in the Treaty.
>
> * * *
>
> "What formula should be employed is not for us to propose. There are many variables—the number of nets, the number of steel head that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when the nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> "The aim is to accommodate the rights of Indians under the Treaty and the *rights of other people.*" (Emphasis supplied) *Department of Game v. Puy-*

allup Tribe, 414 U.S. 44 at 45, 48-49 (1973).

This case presents a classic example of adding wholly new provisions to an Indian treaty to ameliorate a claimed injustice. This Court has repeatedly held that such interpolations are improper. In *Choctaw Nation of Indians v. United States*, 318 U.S. 423 (1943), this Court, after acknowledging the liberal view of interpretation relied on below, went on to say, in reversing the lower court decision which was based upon "findings" of Indian intent:

> "But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. (Citing cases) . . ." 318 U.S. at 432.

Also:

> "But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as an injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government . . . to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law." *United States v. Choctaw Nation*, 179 U.S. 494 at 532-533 (1900).

Also:

> "But the context shows that the Justice meant no

more than the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress." *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335 at 353 (1945).

2.

The Interpretation and Application of the Treaty, As Affirmed by the Court of Appeals, Is Unconstitutional

The Constitution of the United States is of course binding upon all branches of the government—legislative, executive and judicial. There is no doubt that treaty provisions must comply with or give way to the provisions of the U.S. Constitution:

". . . It would not be contended that it [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of its states. . . ." *Geofray v. Riggs*, 133 U.S. 258 at 267 (1890).

". . . There is nothing in this language [the Supremacy Clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . ." *Reid v. Covert*, 354 U.S. 1 at 16 (1957).

The judgment and order in the case before this Court effectively deny non-Indian fishermen in the State of Washington constitutionally protected rights. Citizens and residents outside the State of Washington continue to assert and exercise, on a non-discriminatory basis, their right to exploit the common fisheries in Washington waters.

Salmon off the western coast of the United States run in mixed stock—salmon caught in the ocean off the State of Washington are returning to spawning streams in California, Oregon, Washington and Canada. Conversely, salmon returning to spawning streams in the State of Washington are caught in ocean waters off the coasts of Alaska, Oregon, California and Canada by citizens and residents of those states and that nation. Citizens and residents of Alaska, Oregon and California continue to enjoy their right to fish off the coast of Washington and to catch Washington spawned fish off the coasts of the other states.

On an argument raised for the first time some 120 years after the signing of the treaties, based upon a unique and arbitrary interpretation of treaty language, the citizens and residents of the State of Washington are now judicially restricted from equally exercising those same rights. As to these citizens and residents, there now exists a discriminatory restriction upon their use of the common fishery in order to make a permanent allocation of over 50% of the state's fisheries resources to a small (0.28%) ethnic minority of the citizens of the state.

This is so in spite of the precept that all citizens of the state have:

> ". . . a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and (may) not, without injury to their right, be restrained of it. . . ." *Martin v. Lessee of Waddell,* 16 Pet. 367 at 412 (1842).

Nowhere in the Enabling Act of February 22, 1889, 25 Stat. 676, under which Washington became a state, do the citizens disclaim or surrender their rights to exploit the

common fisheries, particularly of the marginal seas.[2] Furthermore, that Enabling Act declares that:

> ". . . the proposed states . . . shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation." (Section 8)

The right of all citizens to exploit the common fisheries in the marginal seas has remained fully effective and recognized by the Supreme Court. This right is also subject to the protection of both Art. IV, Section 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the Several States") and the Fourteenth Amendment of the U.S. Constitution, which states:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person the equal protection of the law".

Two significant decisions applying the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment to rights of commercial fishermen are: *Toomer v. Witsell*, 334 U.S. 385 (1948); and *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

In *Toomer* the Court held:

> "[W]e hold that commercial shrimping in the marginal seas . . . is within the purview of the privileges and immunities clause . . ." 334 U.S. at 402-403.

In *Takahashi*, the plaintiff challenged a California statute which denied plaintiff the right to a commercial fishing license because, although he was a long-time resident and had been a commercial fisherman for 27 years, he

2. They disclaimed only title to the *lands* reserved to the Indians (Section 4, Second).

was "a person ineligible to (United States) citizenship." The Court struck down the statute as being an unconstitutional deprivation of rights in violation of the Fourteenth Amendment. The Fourteenth Amendment means that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.

> "[Its supposed "ownership" of the fish] is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing . . . while permitting all others to do so." 334 U.S. at 421.

It is to be noted that the treaty before the court, by use of the word "in common with", itself repudiates the idea that it was intended to, or could, create discriminatory classifications.

At least since the adoption of the Fourteenth Amendment in 1865, and certainly since the enactment of the Indian Citizenship Act (43 Stat. 253), the Indian inhabitants of Washington have not only had the right to fish at their usual and accustomed places and on their reservations, but have also had the right to participate freely and equally with non-Indians in the common fishery on marginal seas. As noted, inhabitants of other states have also exercised rights to fish in the marginal seas of their states and in Washington waters, and, as the lower court recognized and found, they catch substantial numbers of salmon outside of Washington waters and jurisdiction which would otherwise have been available to inhabitants of this State. (F.F. 185, p. 102, R. 1680.) Salmon, being an anadromous fish, is no respector of state boundaries and fishermen fishing the marginal seas (Indian and non-Indian alike)

catch salmon running in mixed stocks which would otherwise return to a number of different states or to Canada. (Ex. JX-2a, figures 7 and 8, pp. 00241, 00242)

Under the lower court's ruling, the State is *required* to enact and enforce discriminatory regulations against 99.72% of the population in the case area. The State is to be *forced* to allocate the resources of this 99.72% of its citizens and expend them to place a monopoly control of well over 50% of its harvestable fish in the private hands of a 0.28% ethnic minority of its citizens. In addition, the State is required to permit this ethnic minority to compete freely with the other 99.72% of the citizens in exploiting the fishery at other than Indian's traditional fishing place, and if "a tribal member fishes in the all-citizen fishery at a location which is not a usual and accustomed ground or station of his tribe, that individual's catch will not count toward the tribal off-reservation share." (Ruling on Post-Decision Motions, Exhibit A, p. 3.) The lower court holds 11 state statutes and numerous state regulations void as applied to the Indians, while they must continue to be enforced against non-Indian fishermen.

In short, under the lower court's treaty interpretation and rulings, which are strained and unnecessary in the first place, non-Indians in this state are deprived of privileges and immunities held by other citizens and deprived of the equal protection of the laws with regard to their access to and utilization of the common fisheries on the marginal seas.

A further error in the decision below lies in the persistent failure to distinguish between the power of the federal government to prevent a state from interfering with a

treaty, and the lack of power to require a state to appropriate its resources to *implement* a federal treaty. Our research discloses no text or case authority that under the American Constitutional system the federal government, speaking through a treaty or speaking through a district court, can order a state to allocate its resources discriminatorily to discharge a federal treaty promise, particularly where, as here, the resource is not owned by the state in a proprietary sense, but as a custodian for its citizens as a whole. ". . . [T]he ownership is that of the people in their united sovereignty. . . ." *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

This concept may be tested by example. Of course, the Washington Departments of Fisheries and Game and the state's fish management activity rest solely upon the declaration of the citizens of Washington, expressed in legislation, that these are worthwhile activities. The state has no inherent responsibility to propagate or manage fisheries apart from statute. If the people of Washington through their legislature were to reconsider the worth of these measures, repeal these statutes and withdraw appropriations from Fisheries and Game, with the result that Washington salmon runs were overfished to the point of extinction, it could not lie within the competence of a federal district judge to sign an injunction ordering the re-enactment of these laws, appropriation of moneys, and subsequent executive administration of the laws in the way which that court feels will effectuate his interpretation of a treaty.

It cannot be argued that the decision and orders below do not constitute a reallocation of this resource. The court

orders that the tribes be given preferential rights up to 50% of the harvestable fish, plus reservation and subsistence catches and an "equitable adjustment," and orders that the state and its administrative officers withdraw these fish from the non-Indian fishermen.

This analysis would apply even if it were conceded that the Stevens treaties have the meaning ascribed to them in Final Decision #1. Indeed, if the plaintiff tribes and the court below were correct in their interpretation of the treaty language, the solution could still not constitutionally lie in the direction of issuing orders to the state of Washington mandating the state to give the Indians this public state resource. The remedy for an alleged broken federal promise is federal compensation.

3.

Other Issues Raised By Parties

Amici curiae will not discuss in detail other issues raised by petitioners because the ramifications of these issues and the need for review by this Court is well stated in the petitions. However, we suggest that two of the issues presented by this case are of unusual public significance and particularly merit review.

First, the unsettling impact of the decision below upon the treaties between Canada and the United States regulating the Fraser River sockeye and pink salmon fisheries, and upon the operations of the International Pacific Salmon Fisheries Commissions, is of great public importance.

Second, the unsettling effect of the newly created dual sovereignty between the State of Washington and the numerous Indian Tribes with respect to the salmon fishery,

together with the district court's continuing role as the supreme fisheries administrator, presents a problem of most serious and continuing concern. Both issues transcend in their public importance the bare question of treaty fishing rights.

CONCLUSION

It is believed that this is one of the most important Indian treaty cases to be presented to this Court. A full review by this Court is necessary not only to correct errors on substantive issues but also to re-establish rights of non-Indian citizens and to re-establish the State of Washington in its proper role in the management and conservancy of a sensitive public resource. *Amici curiae* urge this Court to grant certiorari on all three petitions. We respectfully urge the Court to order the parties to supplement the record with all of the proceedings before the district court since its initial decision so that the issues and ramifications can be fully understood.

We also respectfully request that *amici curiae* be permitted to present a brief on the merits following the grant of certiorari.

Respectfully submitted,

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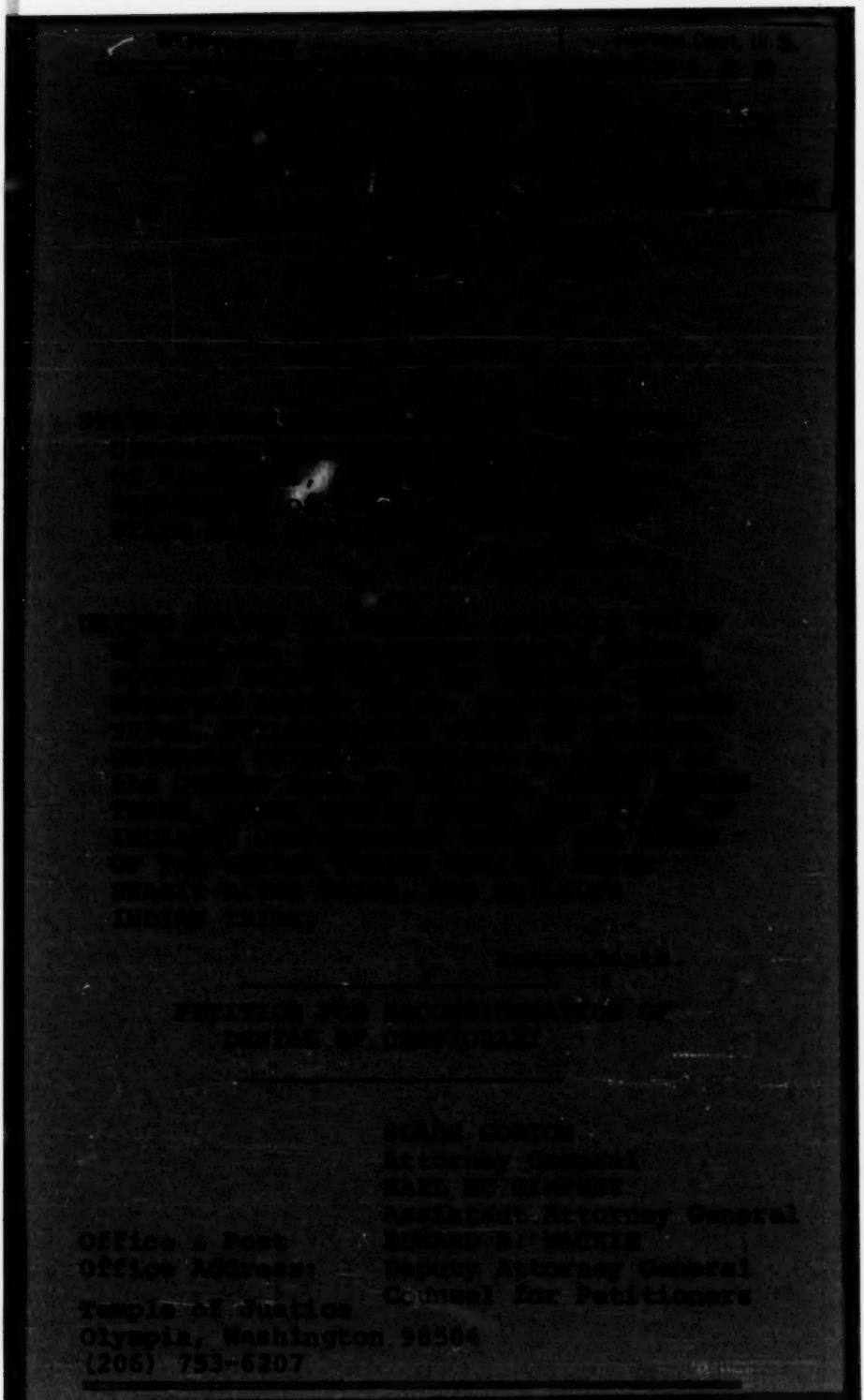

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 588

STATE OF WASHINGTON, THOR C. TOLLEFSON, Director, Washington State Department of Fisheries, CARL CROUSE, Director, Department of Game, and WASHINGTON STATE GAME COMMISSION,

Petitioners,

v.

UNITED STATES OF AMERICA, QUINAULT TRIBE OF INDIANS, MUCKLESHOOT INDIAN TRIBE, SQUAXIN ISLAND TRIBE OF INDIANS, SAUK-SUIATTLE INDIAN TRIBE, SKOKOMISH INDIAN TRIBE, STILLAGUAMISH TRIBE OF INDIANS, QUINAULT TRIBE OF INDIANS on behalf of the QUEETS BAND OF INDIANS, MAKAH INDIAN TRIBE, LUMMI INDIAN TRIBE, HOH TRIBE OF INDIANS, CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, UPPER SKAGIT RIVER TRIBE, AND QUILEUTE INDIAN TRIBE,

Respondents.

PETITION FOR RECONSIDERATION OF DENIAL OF CERTIORARI

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The petitioners State of Washington, Thor C. Tollefson, Director of the Washington State Department of Fisheries, Carl Crouse, Director, Department of Game,

and the Washington State Game Commission, respectfully request a reconsideration pursuant to Supreme Court Rule 58(2) of this Court's denial of certiorari.

The United States government requested an extension of time for the filing of its brief in opposition to the writ of certiorari, but the United States' brief was not filed within the deadline established by the order granting the extension. The government's brief was filed immediately preceding the Court's consideration of the petition, thus eliminating an opportunity for a response. No delay is created by the filing of this request for reconsideration because during the pendency of the appellate process the District Court has continued to exercise jurisdiction in managing the fishery resource of the state in accordance with its judgment and decree. The United States government's brief was prepared by attorneys who did not

participate in the trial of the action nor in the continuing jurisdiction, and in their brief created impressions, which are rebuttable, and may have induced the Court to deny the petition for certiorari.

ARGUMENT

The State of Washington has historically responded in a positive manner to the judicial interpretations which have expanded fishing clauses in Indian treaties. These cases, United States v. Winans, 198 U.S. 371; Tulee v. Washington, 314 U.S. 681; Puyallup Tribe v. Dept. of Game (Puyallup I), 391 U.S. 392; and Dept. of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 44, have all recognized the authority of the state to regulate off-reservation Indian fishing, an authority seriously undermined by the instant proceeding. Following this Court's ruling in Puyallup I, the Department of Fisheries established

special fishing seasons for Indians[1] and following Puyallup II, the Department of Game also established special Indian-only fishing seasons.[2] Both such activities occurred prior to the United States District Court opinion in the instant proceeding. The United States' brief raises the impression that without the protection of the Court decree the Indian harvest of fish in the area would be negligible. In fact the record indicates that members of the plaintiff tribes harvested 29.3% of the Chinook salmon, 30.4% of the Coho, 23.6% of the Pink salmon and 46.6% of the Chum salmon harvested within the state of

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1 Finding of Fact 20 re efforts taken by the Department of Fisheries to augment the volume of fish available to Indians and establishment of special Indian fisheries.

2 Tr. pp. 1478-82.

Washington produced from rivers and streams whereon their fisheries were located.[3]

With reference to the foregoing, we should turn to the statement in the United States' brief that the Department of Fisheries urged that one-third of the fish harvest be allocated to treaty Indians. This Court in Puyallup II, supra, November, 1973, while construing the Treaty of Medicine Creek, which is one of the treaties in this proceeding, did not construe the term "in common" to mean a fifty percent allocation of fish but rather stated:

> "What formula should be employed is not for us to propose. There are many variables--the number of nets, the number of steelhead that can be caught with nets, the places where the nets can be placed, the length of the net

3 Finding of Fact 186, p. 1681, Ex. F6, Ex. F7, Ex. F28; page 331.1 to page 341.21) These percentages were calculated from Ex. F7. The catches do not include fish caught by Indian fishermen in the all-citizen commercial and sport seasons.

> season, the frequency during the season when nets may be used. On the other hand there are the number of hook and line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sport fishing, and the like."

After considering multiple factors the Department of Fisheries suggested that one-third of the harvestable fish from those watersheds in which Indians have usual and accustomed fishing grounds and stations should be available for the Indian fishery. That proposal for a quantification; i.e., the one-third, included the entire catch by Indians whether on or off-reservation. The quantification by the Court is thus substantially more than simply an increase of 16% or 17%. It should be noted and reemphasized that the trial court determination was that:

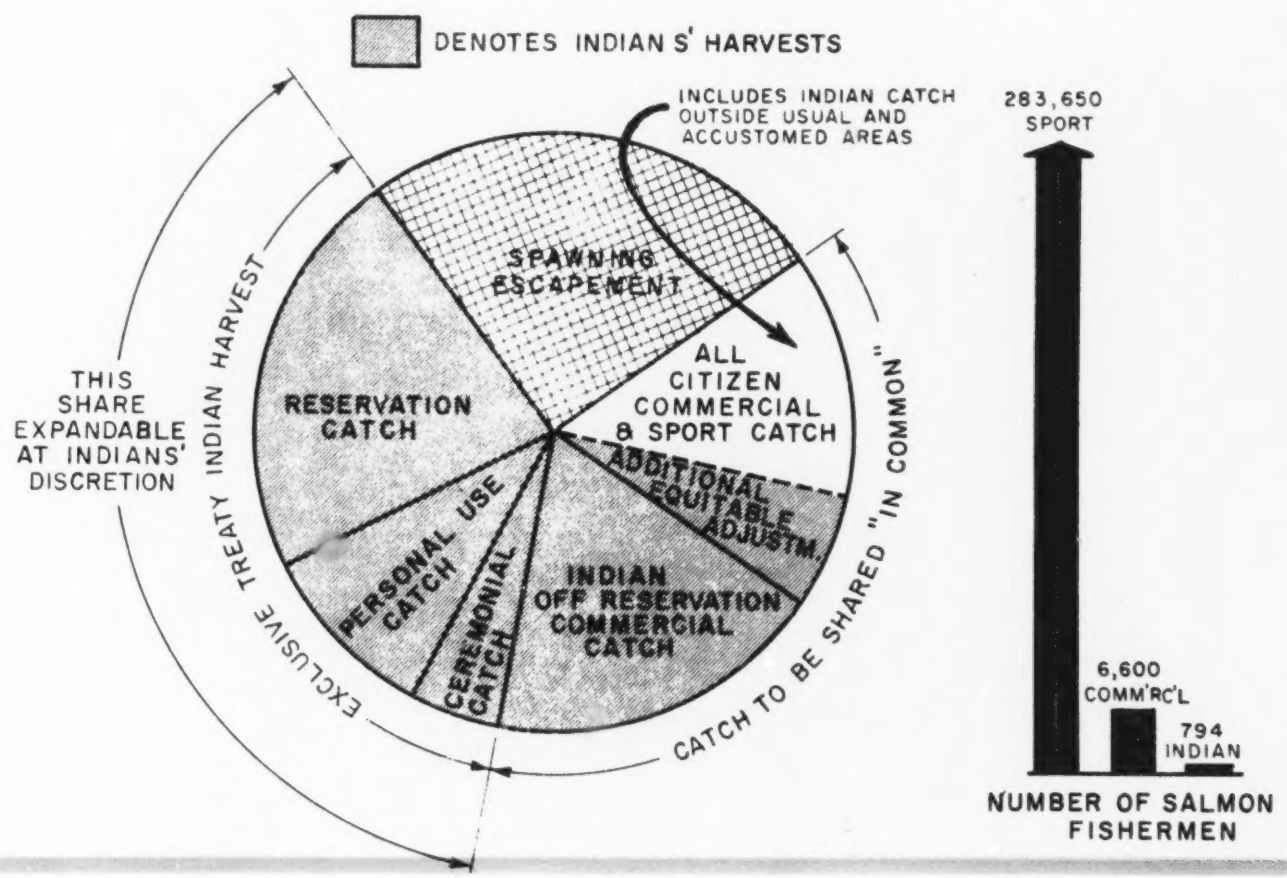
(1) The Indians are entitled to an unlimited catch on the reservation and after the state is advised of the

magnitude of that intended catch it must subtract those fish to be harvested on reservation from the total fish available for harvest in the marine environment.

(2) Indians are entitled to participate in the all-citizen fishery outside of their usual and accustomed grounds and any catches made in such areas count as part of the all-citizen 50% and are not included in the Indians' share of the harvest.

(3) The Indians are entitled to 50% of the fish to be harvested outside of their reservations.

The following page graphically indicates the nature of the court's allocation of the fish resource. We emphasize that the portion entitled ceremonial catch, personal use and reservation catch is expandable at the Indians' discretion, and thus this portion of the total graph can either contract or expand at their option.


DENOTES INDIAN S' HARVESTS
INCLUDES INDIAN CATCH OUTSIDE USUAL AND ACCUSTOMED AREAS
SPAWNING ESCAPEMENT
ALL CITIZEN COMMERCIAL & SPORT CATCH
ADDITIONAL EQUITABLE ADJUSTM.
INDIAN OFF RESERVATION COMMERCIAL CATCH
CEREMONIAL CATCH
PERSONAL USE CATCH
RESERVATION CATCH
THIS SHARE EXPANDABLE AT INDIANS' DISCRETION
EXCLUSIVE TREATY INDIAN HARVEST
CATCH TO BE SHARED "IN COMMON"
283,650 SPORT
6,600 COMM'RC'L
794 INDIAN
NUMBER OF SALMON FISHERMEN

The United States' brief implies that the decisions by the Ninth Circuit and the District Court do not present a problem with reference to the International Pacific Salmon Fisheries Commission jointly created by the United States and Canada for the regulation and control of the Fraser River salmon runs. The Court of Appeals was requested to, but did not, directly rule on the question of the effect of the 1937 Convention (50 Stat. 1355) and implementing legislation on the Indian treaties. The Court did conclude that although the Convention waters subject to the regulation of the International Commission are beyond the jurisdiction of the State of Washington, nevertheless Indians are entitled to additional adjustments to their share of the harvest within the State's jurisdiction to reflect harvests in Convention waters. The United States government has supported the United States District Court's

interference with the ability of the State of Washington to carry out as an agent of the International Pacific Salmon Fisheries Commission the enforcement of regulations adopted by that international body. The state was not contending before the Ninth Circuit that the International Salmon Commission had preempted Indian treaty rights, but rather that insofar as the state acts as an agent of the International Commission which establishes the regulations over the area in question, the state pursuant to the Congressional authorization can directly enforce the Commission's regulations.

CONCLUSION

The petitioners respectfully submit that this Court should reconsider its denial of certiorari and entertain jurisdiction. There are serious jurisdictional concepts vis-a-vis the state and Indian tribes not addressed by the briefs filed

in opposition to certiorari. The serious impact upon the management and harvesting of a major resource of the State of Washington; i.e., the fishery, and the fact that the decision is inconsistent with prior decisions of this Court present strong compelling reasons for this Court to reconsider and to grant certiorari in this proceeding.

DATED this 18th day of February, 1976.

Respectfully submitted,

SLADE GORTON
Attorney General

EARL MC GIMPSEY
Assistant Attorney General

EDWARD B. MACKIE
Deputy Attorney General
Counsel for Petitioners

This petition for reconsideration is submitted in good faith, not for delay, and is necessitated by the unauthorized late filing of the United States' brief immediately preceding consideration by the Court of the petition for certiorari.

EDWARD B. MACKIE
Deputy Attorney General
Temple of Justice
Olympia, Washington 98504

I hereby certify that on this 18th day of February, 1976, three copies of the Petition for Reconsideration of Denial of Certiorari were mailed, postage paid, to Robert H. Bork, Solicitor General, Justice Building, Constitution Avenue between 9th & 10th St., NW, Washington, D.C. 20530, counsel for respondents. I further certify that all parties required to be served have been served.

EDWARD B. MACKIE
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